LIBRARY
SUPREME COURT, U. S.

FILED
OCT 27 1967
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

NO. 768

EDMUND D. OSBOURNE, PITTSBURGH TOWING COMPANY, and CHARLES ZUBIC, JR., as Executor and VIRGINIA ZUBIK DRAMBEL, as Executrix of the Estate of CHARLES ZUBIC, Deceased, Appellants

v.

MISSISSIPPI VALLEY BARGE LINE COMPANY, AMERICAN COMMERCIAL LINES, INC., UNION BARGE LINE CORPORATION, UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, Appellees

## JURISDICTIONAL STATEMENT ON BEHALF OF APPELLANT EDMUND D. OSBOURNE AND PITTSBURGH TOWING COMPANY

On Appeal From the United States District Court for the Eastern District of Missouri, Eastern Division.

JOHN L. LAUBACH, JR.
KENNEY, STEVENS, CLARK & SEMPLE
1677 Gateway #2
Pittsburgh, Pennsylvania 15222
Attorneys for Appellants
EDMUND D. OSBOURNE and
PITTSBURGH TOWING COMPANY

SMITH BROS. CO., INC., LAW PRINTERS, 630 SECOND AVENUE, PITTSBURGH, PA. 15219

## INDEX


| | PAGE |
|---|---|
| Opinion Below | 1 |
| Jurisdiction | 2 |
| Questions Presented | 4 |
| Statement of the Case | 7 |
| The Questions Presented Are Substantial | 15 |
| A. Introduction | 15 |
| B. Commission's Motion to Enforce Judgment and Commission Order Should Not Have Been Heard by a Three Judge Circuit | 18 |
| C. Jurisdiction or Venue for the Commission's Motion Was Not Properly in the Eastern District of Missouri | 19 |
| D. The Matters Raised by the Commission Motion Should Have Been Determined First in Administrative Proceedings Before the Commission | 20 |
| E. Osbourne and the Zubik Estate Are Not Bound by the Earlier Decision in the Case and It Cannot be Extended to Them Personally | 22 |
| F. The Judgment of March 25, 1966 Was Improper Under the Law | 23 |
| G. The Scope of the Injunctive Relief Was Too Broad | 25 |
| H. No Improper or Illegal Conduct Was Shown | 26 |
| Conclusion | 29 |
| Appendix A — Memoradum Opinion of Court Below, July 31, 1967 | 30 |
| Appendix A-1 — Order of Court Below, July 31, 1967 | 43 |
| Appendix A-2 — Order of Court Below, July 31, 1967 | 47 |
| Appendix B — Opinion of Court Below, February 18, 1966 | 49 |

PAGE

Appendix B-1 — Judgment and Decree of Court Below, March 25, 1966 ..... 59

Appendix C — Interstate Commerce Commission Order, January 12, 1967 ..... 61

Appendix D — Interstate Commerce Commission Decision, March 19, 1965 ..... 64

Appendix E — Opinion of Supreme Court of United States, November 7, 1966 ..... 98

## TABLE OF CASES CITED

Alemite Manufacturing Corp. v. Staff, 2 Cir. 1930, 42 F 2d 832 ..... 23

Bailey v. Patterson, 369 U.S. 31, 7 L. ed 2d 512, 82 S. Ct. 549 ..... 3, 15, 18

Gilbertville Trucking Co. v. United States, 371 U.S. 115, 9 L. ed. 2d 177, 83 S. Ct. 217 .. 16, 20, 21, 23, 25

Hansberry v. Lee, 311 U.S. 32, 85 L. ed. 22, 61 S. Ct. 115 ..... 22

Powell v. United States, 300 U.S. 276, 81 L. ed. 643, 57 S. Ct. 470 ..... 16, 18

United States v. Western Pacific Railroad Company, 352 U.S. 59, 1 L. ed. 2d 126, 77 S. Ct. 161 .... 16, 20

## TABLE OF STATUTES, RULES AND REGULATIONS CITED

Statutes

5 USC § 1009 ..... 2, 24

28 USC § 1253 ..... 3, 18

28 USC § 1336 ..... 2

28 USC § 1345 ..... 2

28 USC § 1398 ..... 2, 15, 19

28 USC § 1651 ..... 2, 22

28 USC § 2321 ..... 19

*Table of Cases Cited.*


| | PAGE |
|---|---|
| 28 USC §§ 2321-2325 | 2 |
| 28 USC § 2323 | 15 |
| 28 USC § 2325 | 2 |
| 49 USC § 5 | 21, 25, 27 |
| 49 USC § 17 (9) | 2 |
| 49 USC § 42, 916 | 2, 6, 26 |
| 49 USC § 416 | 19 |
| 49 USC § 912 | 21 |
| 49 USC § 916 | 26 |
| **Rule** | |
| Rule 65. (d) of Federal Rules of Civil Procedure | 23, 25 |
| **Regulations** | |
| 49 CFR 306.1 et seq. | 21 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

EDMUND D. OSBOURNE, PITTSBURGH TOWING COMPANY, and CHARLES ZUBIC, JR., as Executor and VIRGINIA ZUBIK DRAMBEL, as Executrix of the Estate of CHARLES ZUBIC, Deceased, Appellants

v.

MISSISSIPPI VALLEY BARGE LINE COMPANY, AMERICAN COMMERCIAL LINES, INC., UNION BARGE LINE CORPORATION, UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Appellees

## JURISDICTIONAL STATEMENT ON BEHALF OF APPELLANT EDMUND D. OSBOURNE AND PITTSBURGH TOWING COMPANY

### OPINION BELOW

The opinion of the lower Court accompanying the judgment appealed from is unreported, but is attached hereto (30):

The findings of the lower Court are contained in that opinion.

A prior opinion of the lower Court in the case is reported at 252 F. Supp. 162, and is attached (49). The opinion of this Court on appeal from that decision is reported at 385 U S 32, 17 L ed 2d 31, 87 S Ct 195, rehearing denied 385 U S 995, and is attached hereto (98).

An opinion of the Interstate Commerce Commission, from which the appeal to the lower Court was taken, is reported at 324 I.C.C. 460 and is attached hereto (61).

---

## JURISDICTION

This appeal is taken from the entry of a permanent injunction against Edmund D. Osbourne, Pittsburgh Towing Company, and the Executor of the Estate of Charles Zubik, by a Three Judge District Court in the Eastern District of Missouri, Eastern Division (43-46). The Three Judge Court was originally convened pursuant to 28 U.S.C. § 2325, in an action brought by the original plaintiffs herein seeking injunction against the Interstate Commerce Commission under 5 U.S.C. § 1009, 28 U.S.C. §§ 1336, 1398 and 2321-2325, and 49 U.S.C. § 17 (9). After judgment was entered against the Interstate Commerce Commission, the United States and the Interstate Commerce Commission filed, in the same proceeding, a Motion to Enforce Judgment and Commission Order against Edmund D. Osbourne et al., pursuant to the provisions of 28 U. S. C. §§ 1336, 1345, 1651, 2321 and 2323 and 49 U. S. C. §§ 42 and 916. The judgment appealed from was entered on that Motion.

*Jurisdiction.*

The final judgment appealed from was made and entered on July 31, 1967. The notice of appeal was filed on August 30, 1967 in the United States District Court for the Eastern District of Missouri, Eastern Division.

The Supreme Court of the United States has jurisdiction to review by direct appeal the final judgment complained of pursuant to 28 U. S. C. § 1253. *Bailey v. Patterson,* 369 U. S. 31, 7 Led. 2d 512, 82 S Ct. 549, is believed to sustain the jurisdiction of the Supreme Court to review the judgment appealed from.

## QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Did the Court have jurisdiction of Edmund D. Osbourne Pittsburgh Towing Company and Charles Zubik, Jr., as Executor, and Virginia Zubik Drambel, as Executrix of the Estate of Charles Zubik, deceased on the Motion to Enforce Judgment and Commission Order?

2. Was the venue proper for the Motion to Enforce Judgment and Commission Order?

3. Did the Court have jurisdiction of the subject matter of the Motion to Enforce Judgment and Commission Order?

4. Was the Motion to Enforce Judgment and Commission Order properly a matter for the Three Judge Court?

5. Was the Order of July 31, 1967 on the Motion to Enforce Judgment and Commission Order properly ancillary to, or a part of, the prior proceedings before the Court or the Judgment and Decree of the Court entered on March 25, 1966?

6. Did the Court err in holding that Edmund D. Osbourne and Charles Zubik, Jr., as Executor, and Virginia Zubik Drambel, as Executrix of the Estate of Charles Zubik, deceased are bound by and subject to the Judgment and Decree of the Court entered March 25, 1966 at a time when they were not parties to the proceeding?

7. Did the Court err in finding and holding that the Orders of the Interstate Commerce Commission of

September 9, 1960, April 9, 1963, December 19, 1963 and March 19, 1965 should be set aside, annulled and suspended?

8. Did the Court err in expanding its Judgment and Decree of the Court, entered March 25, 1966, which only set aside and enjoined the transfer of Water Certificate W-364 to include regulating and controlling operations under the Certificate?

9. Were all required administrative procedures, provisions and remedies fully complied with or exhausted prior to the filing of the Motion to Enforce Judgment and Commission Order?

10. Did the Court err in finding and holding that Edmund D. Osbourne is improperly controlling and operating Water Certificate W-364?

11. Did the Court err in holding that Pittsburgh Towing Company, Edmund D. Osbourne and Charles Zubik, Jr., as Executor, and Virginia Zubik Drambel, as Executrix of the Estate of Charles Zubik, deceased, violated the Judgment and Decree of the Court entered on March 25, 1966?

12. Did the Court err in holding that Pittsburgh Towing Company, Edmund D. Osbourne and Charles Zubik, Jr., Executor, and Virginia Zubik Drambel, as Executrix of the Estate of Charles Zubik, deceased, had violated the Order of the Interstate Commerce Commission dated January 12, 1967, in Finance Docket No. 21193?

13. Did the Court err in holding that the acts and operations of Edmund D. Osbourne, Pittsburgh Towing Company and Charles Zubik, Jr., as Executor,

and Virginia Zubik Drambel, as Executrix of the Estate of Charles Zubik, deceased, violated Title 49, Sections 42 and 916 of the U. S. Code?

14. Are the broad perpetual injunctions entered against Pittsburgh Towing Company, Edmund O. Osbourne and Charles Zubik, Jr., as Executor, and Virginia Zubik Drambel, as Executrix of the Estate of Charles Zubik, deceased, and others, with respect to operations or conduct under Certificate No. W-364 a proper remedy under the law and evidence?

15. Have Edmund D. Osbourne and Charles Zubik, Jr., as Executor, and Virginia Zubik Drambel, as Executrix of the Estate of Charles Zubik, Deceased, been deprived improperly of their property and contract rights in and relating to Water Certificate No. W-364 without due process of law by the injunctions entered herein?

16. Did the Court err in forever enjoining Edmund D. Osbourne from any connection with Water Certificate W-364, including employment by the holder of the Certificate or the purchase of such Certificate?

## STATEMENT OF THE CASE

This lawsuit began on January 7, 1964, as an action by Mississippi Valley Barge Line Company, (in which American Commercial Barge Line Company and Union Barge Line Company intervened on January 17, 1964) seeking an injunction against the Interstate Commerce Commission and the United States to set aside certain orders of the Commission approving the transfer of Certificate W-364 from Charles Zubic to Pittsburgh Towing Company. Pittsburgh Towing Company intervened in the suit. On March 25, 1966, the Three Judge Court convened in the proceeding entered its Judgment and Decree of the Court, annulling the transfer orders and enjoining the Commission from transferring the Certificate pursuant to those orders (59, 60). The lower Court reversed and set aside the decision of the full Commission (64) affirming the transfer against attack by the same three competiting water carriers who, as the Commission noted, had been stirred to action only after its original transfer order of September 9, 1960 had become effective and the transferee had filed rates lower than theirs (66). The lower Court invalidated the transfer, more that five years after it was made, on the ground that there had been a failure to comply with the Commission's transfer regulations.

An Appeal was taken to this Court by Pittsburgh Towing Company. However, because the appeal was not docketed timely, it was dismissed and the judgment of the lower Court became final in December 1966 (98).

In compliance with the judgment against it, on January 12, 1967 the Commission set aside its orders annulled by the Court, directed Pittsburgh Towing Com-

pany to cease operations under such orders, directed it to cancel its various tariffs, and ordered it to refrain from performing transportation for which it had no effective tariffs on file with the Commission (61-63).

Upon entry of the Commission order, the Certificate reverted to the Estate of Charles Zubik, Zubik having died in August, 1966. Pittsburgh Towing Company immediately ceased all operations except those incident to winding up its affairs. The Zubik Estate immediately filed a tariff which, to insure unhampered operations, was identical with the former Pittsburgh Towing Company tariff. At the same time a general Power of Attorney from the Zubik Estate to Osbourne was submitted to the Commission. This Power of Attorney was revoked on April 14, 1967.

The Zubik Estate entered into an agreement with Osbourne, acting through Western Rivers Corporation which he owned, to manage day to day operations under the Certificate. Osbourne was thoroughly familiar with such operations as the President and then only stockholder in Pittsburgh Towing Company. Bills of lading, billings and other documents were issued in the name of the Zubik Estate, which entered into contractual relations with the sole customer of the operation, Jones and Laughlin Steel Corporation, and with Inland Towing Company, which provided tow boats used in the towing operation. Certificate W-364 covered only towing authority — i.e. the towing of a customer's barge and cargo. All operations were thereafter conducted in the name of the Estate and all required reports to the Commission were filed by the Estate.

In February and March 1967, Mr. Walsh, an employee of the Commission, examined the Zubik Estate

operation and made reports to the Commission of his investigations. The Commission made no complaint concerning the operation, instituted no proceeding questioning the propriety of the operation and served no report concerning its investigation. It appeared to have approved the operation.

The orginal plaintiffs, however, attacked the Zubik tariff, first before the Commission and, when that was unsuccessful, by a motion in the lower Court seeking to require the Commission to show cause why it should not strike the Zubik tariff. Plaintiffs argued that the power of attorney to Osbourne, together with the Zubik tariff, constituted a transfer of the Certificate in violation of the lower Court's judgment. On May 5, 1967, the Commission responded that the filing of a tariff (which is a statutory obligation) was unrelated to either a transfer of the certificate or to the mode of operation under the Certificate; that the charges of improper operation were unproved allegations; and that proper procedure required plaintiffs to file a complaint with the Commission upon which a public hearing would be held. The plaintiffs filed no such complaint and the Commission made no further investigation of the matter (until the week of July 18, 1967), except that its investigator, who read in a Pittsburgh paper of the filing of an inventory by the Zubik Estate, secured a copy from the probate court.

On May 6, 1967, a preliminary hearing was held on the plaintiff's motion to strike the Zubik tariff. Charles Zubik, Jr. and Virginia Zubik Drambel, as executors of the Zubik Estate, then intervened and became parties for the first time. During the hearing, one judge warned all parties, including the Commission, that he would

vote to hold in contempt anyone who participated in an attempt to circumvent the judgment of March 25, 1966. A remarkable change in the Commission's attitude followed.

On June 14, 1967, the Commission filed a Motion to Enforce Judgment and Commission Order, naming the Commission and the United States as plaintiffs, and the Executors of the Zubik Estate, Pittsburgh Towing Company, and Edmund D. Osbourne as defendants. A motion for a temporary injunction was also field. The Commission motion charged improper conduct, evasion, fraud, and violation of the judgment of March 25, 1966 and of the Commission Order of January 12, 1967, in general terms. No specific acts were specified as violations. Neither Osbourne, who had never been a party to the proceedings, Pittsburgh Towing Company nor the Zubik Estate, were served with process. No court order was entered although a proposed order to show cause was lodged with the Court.

Nevertheless, on July 6, 1967, at a hearing scheduled on the original plaintiffs' motion to strike the Zubik tariff, the Court announced it was holding a hearing on the Commission's request for a temporary injunction. Over objection of counsel for Osbourne, Pittsburgh Towing Company, and the Zubik Estate, and the filing of answers questioning jurisdiction and venue, the propriety of a Three Judge Court hearing the matter, the exhaustion of administrative remedies, and the deprivation of rights without due process of law, the hearing was held and evidence taken.

On July 10, 1967, a brief for the defendants named in the Commission Motion was filed. On the same day,

the Commission refiled both its Motion to Enforce Judgment and Commission Order and its Motion for Temporary Injunction. An order was made by one judge, without notice, entering a rule and fixing July 27, 1967, for hearing.

On July 27, 1967, the lower Court announced that the final hearing was being combined with the hearing on the temporary injunction. The testimony of Mr. Walsh, given at the earlier hearing, was admitted in evidence by stipulation. Walsh described the operation and admitted that the defendants had cooperated in his investigation, furnishing all information which was requested. The Commission also introduced evidence through Osbourne, Charles Zubik, Jr., an employee of Jones & Laughlin Steel Company and an officer of Inland Towing Company. There was little or no conflict in the evidence.

Zubik, Jr. and Osbourne both testified that the Zubik Estate faced very serious problems when the Certificate was returned to it; that it could not repay Osbourne the $87,500 which he had paid for the Certificate; that Osbourne was familiar with the towing business, but the Executors of the Estate were not; that maintainence of the value of the Certificate required continuous uninterrupted operations; that loss of the Certificate through dormancy or substantial diminution in its value would have very serious economic consequences to both the Zubik Estate and to Osbourne, as a large creditor of the Estate; that operations under the Certificate had, because of the litigation, been virtually reduced to one customer with which Osbourne had very good relations, but with which the Estate personnel had no relations; that the only known person available to manage the towing

operations was Osbourne; and that the nature of the business was such that its day to day operations would be the same irrespective of who owned it.

They testified that Osbourne, through Western Rivers Corporation which he owned, was hired to manage the operation for the Estate, subject to the control of the Executors of the Estate who also spent substantial time in handling matters arising in connection with the Certificate. The Zubik Estate, through reimbursement of Western Rivers Corporation, paid all expenses of the operation. All receipts were paid to the Estate.

Zubik, Jr., and Osbourne identified a letter of January 6, 1967, which set forth certain basic understandings and agreements concerning the management of operations under the Certificate. They also testified that because the Estate was insolvent on a cash basis, and to avoid possible surcharge of the Executors, Western Rivers Corporation had agreed to reimburse the estate for any loss resulting *from operations* under the Certificate. Continued operation under the Certificate was essential to protect Osbourne's interest, as a creditor, in the solvency of the estate and to enable him to continue an employment for which he was well qualified. Osbourne testified that, except for a very minimal amount of consulting work, his only employment was in managing the operations under the Certificate for the Zubik Estate and such employment was virtually his only source of income.

An inventory filed in the Zubik Estate was introduced which did not list Certificate W-364 as an asset. However, the Certificate was not returned to the Zubik Estate until months after the death of Mr. Zubik, and the Estate counsel advised that it should not be included in the inventory.

The evidence established that on June 8, 1967, Osbourne entered into an agreement to purchase Certificate W-364 from the Zubik Estate for $102,500, against which the $87,500 previously received by Zubik was to be credited, and $15,000 paid in cash upon approval of the transfer. The required transfer application had been filed with the Commission and was introduced in evidence.

At the conclusion of the hearing, the lower Court expressed doubt as to its right to take action on the Zubik tariff. The Commission's counsel then suggested that the Court remand the tariff matter to the Commission with instructions indicating that it should be stricken.

The hearing was completed on Thursday, July 27, 1967. On Monday, July 31, 1967, and without affording counsel the opportunity to argue or brief any issue, the lower Court filed its Memorandum Opinion (30-43) and entered its order holding that operations under Certificate W-364 violated its prior judgment, the Interstate Commerce Act, and the Commission Order of January 12, 1967. It then entered broad and sweeping junctions against Pittsburgh Towing Company, Osbourne, and the Zubik Estate from which this appeal is taken (43-46).

The lower Court's order of July 31, 1967, perpetually enjoined Pittsburgh Towing Company, its agents, employees and representatives, from transporting or holding out to transport property under Certificate W-364, thus barring any future acquisition of the certificate.

The injunction was even broader in its application to Osbourne, who was not only perpetually enjoined from transporting or holding out to transport property under

Certificate W-364, but was also forever enjoined from directly or indirectly "aiding and abetting transportation" of property under the authority of Certificate W-364. He was thereby immediately deprived of his employment, his livelihood and his contractual right to acquire Certificate W-364 from the Zubik Estate pursuant to the agreement of June 8, 1967.

At the same time the lower Court, by separate order (47) remanded to the Commission the matter of striking the Zubik tariff, with the rather transparent suggestion that it do so. Since the filing of this Appeal, the Commission, without further hearing, did strike the Zubik tariff, thereby rendering the Certificate inoperative.

Pittsburgh Towing Company, Osbourne, and the Executors of the Zubik Estate then filed their appeal from the injunction order of July 31, 1967 to this Court and a similar appeal to the Court of Appeals for the Eighth Circuit.

After filing notice of appeal, a stay of enforcement of the injunction was sought in the lower Court, but such stay was refused.

## THE QUESTIONS PRESENTED ARE SUBSTANTIAL

### A. Introduction

This appeal requires careful identification and analysis of the original action filed in the Eastern District of Missouri and the original judgment therein. The present procedural nightmare of pleadings, motions and changing position of parties requires their comparison and relation to that case. Comparison quickly discloses that, except for superficial contacts, the original case and the present judgment are not related and the juxtaposition of these has inflicted serious injury to the present appellants.

The original case raised the single issue of whether specific orders of the Commission approving transfer of Certificate W-364 pursuant to a transfer application filed July 8, 1960, were properly entered. It was cognizable in the Eastern District of Missouri only because the original plaintiff had its principal place of business in St. Louis. (28 U. S. C. § 1398). Because injunctive relief was sought against the Commission, a Three Judge Court was required. (28 U. S. C. § 2323). Relief was sought only against the Commission and the United States. Pittsburgh Towing Company was an Intervenor, and no relief was ever sought or entered against it.

While we believe the Judgment of the lower Court entered March 25, 1966, was erroneous, it nevertheless recognized the limited purpose of the original suit and the narrow limit of permissible inquiry. Decisions of this Court limit a three judge court's action to those specific and peculiar areas entrusted to it — here a request for injunctive relief against the Commission. *Bailey v. Pat-*

*terson,* 369 U. S. 31, 7 Led 2d 515, 82 S Ct 549; *Powell v. United States,* 300 U. S. 276, 81 Led 643, 57 S. Ct. 470. Accordingly, the first Judgment merely (1) set aside, annuled and suspended specific orders of the Commission and (2) permanently enjoined *the Commission* from transferring the Certificate pursuant to those specific orders. It did not, and could not, decide how operations were to be thereafter conducted under the Certificate or when, how, or to whom the Certificate could be later transferred, pursuant to other agreements or other applications. Not only did the pleadings fail to present such questions for decision, but also the primary jurisdiction over such matters lay with the Commission itself: *United States v. Western Pacific Railroad Company,* 352 U. S. 59, 1 Led 2d 126, 77 S Ct 161. A court's proper function is solely to review the propriety of Commission action and that review is extremely narrow. *Gilbertville Trucking Co. v. United States,* 371 U. S. 115, 9 Led 2d 177, 83 S Ct 217. The Three Judge Court convened at Civil Action No. 64c 3(1) in the Eastern District of Missouri therefore did not acquire broad supervisory and regulatory powers over Certificate W-364 through its decision on a limited issue relating to one proposed transfer of the Certificate.

Curiously, the lower Court's first decision so narrowly construed its scope of inquiry as to refuse to consider, or permit the Commission to consider, any matter supporting the transfer which occurred after July 8, 1960, the date the transfer application was filed. However, in the present order it has extened that initial judgment to matters occurring seven years later and to future conduct and relationships as well. Such inconsistency serves only to bar Osbourne as a potential

competitor of the original plaintiffs, which, while an understandable object of the competing barge lines, is a highly unusual judicial object. The hearing established clearly that the conduct challenged by the Commission's Motion was not an attempted transfer of the Certificate pursuant to the old application or orders, but rather, action stemming from new agreements and arrangements made between Osbourne and the Zubik Estate in early 1967 to meet the critical situation created by the return of the Certificate to the Zubik Estate.

The lower Court's Memorandum Opinion of July 31, 1967, stresses Osbourne's violation of its prior judgment. The hearings of July 6, 1967 and July 27, 1967, were similarly punctuated with references to chicanery, subterfuge and evasion by at least one member of the Court. However, neither Pittsburgh Towning Company nor Osbourne had to evade the prior judgment because it was not directed to them. It was completely and effectively satisfied when the Commission, by its January 12, 1967 Order, canceled the transfer. Pittsburgh Towing Company, the Zubik Estate, and Osbourne could only have violated that Judgment by acting in concert with the Commission. The Commission neither alleged nor proved such concerted action.

The questions raised by this appeal are extremely substantial to Osbourne, who has been deprived of his employment, of his contract right to buy Certificate W-364, of his right to engage in a business enterprise he created, and probably of his prior investment in that Certificate and business as well. In the overall administration of justice, this appeal raises serious questions of jurisdiction and venue, of due process of law,

both procedural and substantive, and of the relation of the Commission's primary jurisdiction in regulating and supervising water certificates and a court's place in reviewing such matters.

**B. The Commission's Motion to Enforce Judgment and Commission Order Should Not Have Been Heard by a Three Judge Circuit.**

A three judge court is proper in Interstate Commerce Commision cases only where injunctive relief is sought against the Commission. 28 U.S.C. §. 2325; *Bailey v. Patterson,* 369 U S 39, 7 L ed 2d 512, 82 S Ct 549; *Powell v. United States,* 300 U. S. 276, 81 L ed 643, 57 S Ct 470. The Commission Motion sought no injunctive relief against itself. Because the prior judgment was entered only against the Commission, and related solely to the transfer in 1960, the present attempt to extend the judgment to new parties for matters occurring in 1967, is completely groundless. The assertion of such an unsubstantial claim, even if ancillary to the main suit, cannot justify action by a three judge court, under the rule of the cited cases.

Because the Commission Motion did not require action by a three judge court, an appeal should not be taken directly to this Court. 28 U.S.C. §. 1253; *Bailey v. Patterson,* 369 U S 31, 7 L ed 2d 512, 82 S Ct 549. Nevertheless, as that case held, this Court may, on this appeal, determine the authority of the Court below and make a necessary corrective order. The extreme action of the Court below in destroying Osbourne's employment and contractual rights, and in stigmatizing his conduct, when it lacked jurisdiction in the matter requires immediate corrective action of reversal and dismissal of the proceeding.

**C. Jurisdiction or Venue for the Commission's Motion Was Not Properly in the Eastern District of Missouri.**

Because the Commission's Motion was not properly ancillary to the prior action, it must be treated as an independent proceeding. A Commission action to enforce its own Order, or the Act, against a water carrier must be brought, under Part III Section 316, of the Interstate Commerce Act, 49 U.S.C. § 416, in "any District Court of the United States having jurisdiction of the parties". It is submitted that the Eastern District of Missouri should not have jurisdiction of Osbourne, the executors of the Zubik Estate, or Pittsburgh Towing Company, all of whom were located in the Western District of Pennsylvania, and none of whom had any business or office in the Eastern District of Missouri, even though its process may be served in Pennsylvania under 28 U.S.C. § 2321.

Moreover, while the general venue provision relating to actions involving Commission matters, 28 U.S.C. § 1398, appears primarily applicable to actions brought by parties other than the Commission, it nevertheless establishes venue, except as otherwise provided by law, in the judicial district containing the residence or principal office of any of the parties bringing the suit. The principal office of neither the United States nor the Commission is in the Eastern District of Missouri.

We submit that the Eastern District of Missouri is not the proper place to litigate concerning activities of Pennsylvania residents occurring in Pennsylvania. If jurisdiction or venue were proper in this case, then the Commission is free to bring suit wherever, in its

unbridled discretion, it chooses and subject any defendant to the inconvenience and expense of defending itself in such place if it be distant. Commission practice has been otherwise, as it should be.

### D. The Matters Raised by the Commission Motion Should Have Been Determined First in Administrative Proceedings Before the Commission.

The issues raised by the Commission Motion relate solely to operations under the Certificate in 1967 and the future. They had nothing to do with the seven year old transfer except that they were precipitated by its cancellation. The Commission recognized that it, not the Court, should first decide such matters when it answered the original plaintiff's motion to strike the Zubik tariff. It abandoned that position and filed its motion in Court, rather than proceeding administratively, when the lower Court demonstrated a continuing interest in Certificate W-364.

The Commission's initial position is the law. As numerous decisions of this Court hold, including the recent decisions in *Gilbertville Trucking Co. v. United States*, 371 US 115, 9 L ed 2d 177, 83 S Ct. 217 and *United States v. Western Pacific Railroad Company*, 352 US 59, 1 L ed 2d 126, 77 S Ct 161, the primary jurisdiction to decide the factual and legal significance of matters within the peculiar competency of an administrative agency is in that agency. Resort must first be had to the agency, even though a Court would normally have concurrent jurisdiction. Questions of transfer, control and operation of water carriers are all within the peculiar expertise of the Commission.

*The Questions Presented Are Substantial.*

Control of the transfer of water certificates has been specifically vested in the Commission by 49 U.S.C. § 912. The power thus given has been amplified by Commission regulations promulgated thereunder 49 CFR 306.1 et seq. Section 5 of the Act, 49 U.S.C. § 5, limiting transfers of a certificate to, or the assumption of control or management of a Certificate by, another carrier specifically provides, in Paragraph 7, for administrative hearings on such matters. The *Gilbertville Trucking Co.* case holds that determinations of "control" of a carrier are to be made by the Commission in the light of current practices. While this case does not involve Section 5, and there is therefore no statutory prohibition against the management or control of the Certificate W-364 by Osbourne, the same primary jurisdiction rule should be applied because the Commissions expertise would be no less pertinent than in a Section 5 matter.

Water carriers must have the right to hire employees, make financial arrangements, and do a myriad of other things such as the Zubik Estate did in 1967 after the Certificate was returned to it. The plaintiff barge lines companies do the same thing since their shareholders and directors do not manage day to day operations. The limit, if any, on what is permissible in this area should be set by the Commission in accordance with its overall regulatory powers, experience, goals, and familiarity with the practical aspects of conducting carrier operations, rather than a Court whose qualifications and knowledge are quite different.

Proper administrative action would, undoubtedly, have resolved the specifics of any asserted violation of the Act or of the Commission Order of January 12, 1967, if there were any. It would have permitted oppor-

tunity for reasonable action to remedy those violations, rather than resulting in a sweeping condemnation of the defendants and their judicially imposed divorce from the Certificate. The inescapable inference from the Commission's failure to take action on its own investigation is clearly that, as an administrative body, it found nothing wrong. However, as the potential object of a contempt citation, it bowed to the lower Courts rather different view of the case. This same ambivalence was also apparent in the Commissions varied responses to the motion to strike the Zubik Tariff. At first, as an administrative body, it replied that the attempt to strike the tariff was groundless — later as the defendant in this law suit it elected to trim its course closer to that of the lower Court.

The administrative process requires that the appealed Order be reversed so that administrative fact finding and expertise may be first applied in an atmosphere free of judicial interference. Any subsequent appeal should then be to the court properly having jurisdiction.

### E. Osbourne and the Zubik Estate Are Not Bound by the Earlier Decision in the Case and It Cannot be Extended to Them Personally.

The original judgment was entered when neither the Zubik Estate nor Osbourne were parties. The order appealed from has the legal and practical effect of extending that judgment against them personally. However, a person cannot be bound personally by any judgment unless he was a party when it was entered: *Hansberry v. Lee,* 311 U. S. 32, 85 L ed 22, 61 S Ct 115. The All Writs Act, 28 U. S. C. § 1651, cannot, as the lower

Court held, abrogate such a basic legal concept founded in due process.

Moreover, even though Rule 65 (d) of the Rules of Civil Procedure, permits an injunction to be effective against the officers, agents, servants, employees and attorneys, of a party and those in privity with, or acting in concert with, such party, the officer, agent, servant or employee must be acting in his representative capacity — not in his individual capacity — to be bound: *Alemite Manufacturing Corp. v. Staff*, 2 Cir 1930, 42 F 2d 832. Neither Osbourne nor the Zubik Estate were shown to be acting in concert with the Commission, against whom, the original injunction was entered. It is further evident that in 1967 they were acting in their individual capacity for their individual interests and not as the officers, agents, employees or servants of any party. Hence the injunction cannot be extended to them personally.

### F. The Judgment of March 25, 1966 Was Improper Under the Law

The present judgment against Osbourne, Pittsburgh Towing Company and the Zubik Estate is grounded upon the prior judgment of the lower Court. That judgment, entered when Osbourne and the Zubik Estate were not personally parties to the litigation is not res adjudicata as to them. They are therefore free to challenge it, if they are to be bound by it.

The lower Court's function, in reviewing the Commission's transfer orders, was by the decisions of this Court extremely limited. As held in *Gilbertville Trucking Co. v. United States*, 371 U. S. 115, 9 L ed 2d 177, 83 S Ct 217, where the issues are within the Commis-

sion's peculiar competence, judicial review is limited to ascertaining whether the decision had a rational basis and was supported by substantial evidence. The lower Court did much more in reversing the Commission.

The lower Court not only improperly substituted its fatteral conclusion for those of the Commission, but also held that the case had to be decided as of the day the first transfer application was filed. It did not permit cognizance of later matters presented before the Commission when it made its final decision (57). This denied any right to amend or cure deficiences in the application during the administrative process. The right to amend exists in all judicial or quasi-judicial proceedings, and is essential if piece-meal procedures are to be avoided.

The policy of the law (as seen in Section 10 of the Administrative Procedures Act, 5 U. S. C. § 1009) is to postpone review until a matter has been completely concluded in the subordinate jurisdiction. The lower Court decision did the opposite. Under its decision a subsequent filing of the same transfer application, and the same additional information supplied to the Commission during the administrative proceeding, would have validated the transfer. Such procedural redundancy is unwarranted.

Further usurpation of the Commission function occurred when the Court refused the Commission's right to take notice of economic conditions justifying Zubik's prior suspension of operations. A matter closer to the expertise of an agency charged with the overall supervision of water carrier activities is difficult to imagine.

A further significant question also appears — why should the competitors of a Certificate have any right at all to question who owns or operates it, except in cases arising under 49 U. S. C. S. 5? Particularly is this so where the plaintiff barge companies' action was precipitated by the filing of lower rates under Certificate W-364 than theirs. The shipping public is therefore also a loser as a result of the action of the lower Court.

### G. The Scope of the Injunctive Relief Was Too Broad

Even if the actions of Osbourne and the Zubik Estate were improper, the scope of injunctive relief granted was too broad. As pointed out in *Gilbertville Trucking Co. v. United States,* 371 US 118, 9 L ed 2d 177, 83 S Ct 217, a case involving improper control of a carrier, any remedy should be tailored to give the relief necessary while doing as little injury as possible. Here the exact contrary occurred — maximum injury was inflicted to achieve minimal benefit.

Deprivation of a man's job and his future contractual rights should not be lightly done. Even unlawful control, management, or transfer of a certificate can be prevented without also prohibiting future legal transfer, or present or future legal employment. Indeed, Rule 65 (d) of the Rules of Civil Procedure specifically requires that injunctive relief detail the proscribed conduct so that the enjoined party may reasonably know what is prevented and so that the remedy does not, as here, exceed the required scope.

The lower Court, whose jaundiced view of Osbourne was consistently displayed, gave no thought to the cir-

cumstances attending its present order. The Court improperly characterized Pittsburgh Towing Company's operation from 1960 through 1966 as illegal, even though it operated throughout pursuant to orders of the Commission. The tardy application for relief, by the original plaintiffs, compounded the problems. Conditions and circumstances arose that could not be unscrambled at the mere snap of the Court's finger.

As Osbourne and Zubik, Jr., testified they would gladly have seen the Certificate go to a larger and stronger adversary of the plaintiffs, but seven years of litigation had scared any purchasers away. Their own financial condition made it unthinkable to merely walk away. They had to take action to protect their own interests. No overriding interest of the public has ever been shown to be adversely affected. Therefore the resort to the extreme remedy seen here was needless punishment, unwarranted under any circumstance.

### H. No Improper or Illegal Conduct Was Shown

The evidence failed to establish any illegal or improper action by Osbourne, Pittsburgh Towing Company, or the Zubik Estate as charged in the Commission Motion.

The Motion charged violation of 49 U. S. C. §§ 42 and 916. However, both of those sections relate to procedural, not substantive matters. The Motion charged violation of the lower Court's prior judgment. That judgment contained only an injunction against the Commission (59, 60). The Motion charged violation of the Commission Order of January 12, 1967, but that Order was directed only to Pittsburgh Towing Company

(61-63), and the only part of the order which had not been completely executed through prior action before the Commission, was the direction to Pittsburgh Towing Company to refrain from performing transportation for which it had no effective notes on file. The Commission's evidence established that Pittsburgh Towing Company had ceased operations and that Osbourne's actions were all directed to his personal interests. Accordingly, the Commission failed to prove the case it asserted.

The Commission administers the Interstate Commerce Act. Courts review the Commission's administration of the Act. Neither Commission nor Court can make illegal that which is proper under the Act. Neither can prohibit what the Act permits — for the Act is the source of the substantive law. Except for the limitations in Section 5, 49 USC § 5, on control or management of one carrier by another carrier, the Act contains no restrictions on the exercise of, or any change in, the management or control of a carrier. Under the Act, and under Commission practice, the management, control and complete ownership of a corporate carrier may be changed without Commission approval, except in a Section 5 case. Why should the management or control of operations under a Certificate owned by an individual or an estate be different? Common sense, due process, and equality before the law ordain that it not be. Individuals and fiduciaries should have the same flexibility in choosing management for their operations. Consequently, there was no substantive legal basis for the attempt to prevent Osbourne's management of operations under Certificate W-364 for the Zubik Estate.

*The Questions Presented Are Substantial.*

Incidentally, the substantive law is not changed by the expedient of equating "management" or "control" with "transfer". Section 5 of the Act recognizes the difference by providing specifically for them. The same difference is recognized in the Commission practice relative to corporations — so long as ownership of the Certificate itself is not changed, ownership of the owner may be freely changed and no "transfer" is involved. The ownership of the Certificate W-364 always remained in the Zubik Estate, it remained responsible to the Commission and to the public for its operation, and therefore, no transfer occurred.

A substantive cause of action is not established where none exists, by styling conduct as fraud, deceit or chicanery. Moreover, the Commission was certainly not deceived — all evidence established that it knew of Osbourne's management of Zubik's operations from the inception. It failed to act then because the Commission knew that under the Interstate Commerce Act, and under its own regulations and orders, nothing was wrong. The Lower Court should have so held.

## CONCLUSION

For the foregoing reasons, we respectfully request that the Supreme Court of the United States reverse the judgment of the lower Court on the ground that it had no jurisdiction or power to enter it. If the judgment is not so dismissed, we respectfully request that the Court give plenary consideration to the questions raised by this appeal.

Respectfully Submitted

.....

JOHN L. LAUBACH, JR.
KENNY, STEVENS, CLARK & SEMPLE
1677 Gateway Two
Pittsburgh, Pennsylvania 15222
Attorneys for Appellents
Edmund D. Osbourne and
Pittsburgh Towing Company

## APPENDIX A.

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MISSISSIPPI VALLEY BARGE LINE COMPANY, AMERICAN COMMERCIAL LINES, INC., and UNION BARGE LINE CORPORATION,
Plaintiffs,
vs.
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants,
and
PITTSBURGH TOWING COMPANY, CHARLES ZUBIK, JR., as Executor, and VIRGINIA ZUBIK DRAMBEL, as Executrix, of the Estate of CHARLES ZUBIK, Deceased,
Intervenors.

No. 64C 3 (1)

---

Before MATTHES, Circuit Judge, HARPER and MEREDITH, District Judges.

HARPER, District Judge.

### Memorandum Opinion

Filed July 31, 1967

On April 6, 1967, the plaintiffs filed a motion to require defendant, Interstate Commerce Commission, to show cause why it should not set aside its order of

February 9, 1967, refusing to strike tariff of Charles Zubik, Jr., Executor, and Virginia Zubik Drambel, Executrix, and to show cause why such tariff should not be stricken from the Commission's files, and the said motion was noticed for hearing on May 5, 1967.

On May 3, 1967, Charles Zubik, Jr., Executor and Virginia Zubik Drambel, Executrix, of the Estate of Charles Zubik, Deceased, filed a motion for leave to intervene.

On May 5, 1967, the plaintiff's motion was presented to the court and an order was issued to the Interstate Commerce Commission to show cause on July 6, 1967, why its order of February 9, 1967, refusing to strike the tariff of Charles Zubik, Jr., Executor, and Virginia Zubik Drambel, Executrix, of the Estate of Charles Zubik, Deceased, should not be set aside and said tariff stricken from its files and records, and the court further granted Charles Zubik, Jr., Executor, and Virginia Zubik Drambel, Executrix, of the Estate of Charles Zubic, Deceased, leave to intervene.

The parties were ordered to file exhibits or a statement of fact and briefs and responsive briefs.

Thereafter, on June 16, 1967, the United States of America and the Interstate Commerce Commission filed with the clerk of the court a motion to enforce judgment and commission order, and at the same time filed with the clerk a motion for a temporary injunction, and lodged with the clerk of the court an order to show cause.

The defendants in the two motions and order to show cause were Edmund D. Osbourne, Pittsburgh Tow-

ing Company, Charles Zubik, Jr., as Executor, and Virginia Zubik Drambel, as Executrix, of the Estate of Charles Zubik, Deceased.

On July 6, 1967, the various motions were presented and argued to the court, and the testimony of one witness, John T. Walsh, was heard. The attorney for Edmund D. Osbourne, raised the question of jurisdiction with respect to his client, who had not been served and was not a party to the original litigation, and had not entered his appearance.

Thereafter, on July 10, 1967, the office of the United States Attorney, on behalf of the United States of America and the Interstate Commerce Commission, refiled the motion to enforce judgment and commission order and the motion for temporary injunction previously referred to, and requested the court to, and the court did issue the order to show cause, returnable July 27, 1967, and all of the parties defendant, namely, Edmund D. Osbourne, Pittsburgh Towing Company, Charles Zubik, Jr., as Executor, and Virginia Zubik Drambel, as Executrix, of the Estate of Charles Zubik, Deceased, were served with the order to show cause. The order to show cause seeks a temporary injuction pursuant to the motion to enforce judgment and commission order, which motion in addition seeks a permanent injunction.

On July 27, 1967, when the matter came on for hearing before the court, before the commencement of the hearing, the court ordered the trial of the action on the merits advanced and consolidated with the hearing of the application for the temporary injunction, pursuant to Rule 65(a)(2) of the Rules of Civil Procedure, and the hearing on the temporary and permanent injunction was consolidated.

*Appendix A.*

The parties stipulated that the testimony introduced at the hearing before the court on July 6, 1967, was to be treated as a part of the record and as testimony in the hearing with respect to orders to show cause and the seeking of the injunction.

The testimony and the facts deduced from the record and the file disclose that the plaintiffs, Mississippi Valley Barge Line Company, American Commercial Lines, Inc., and Union Barge Line Corporation, commenced this three-judge action on January 7, 1964, to enjoin, set aside, annul, and suspend orders of the Interstate Commerce Commission (hereinafter referred to as the Commission) authorizing one Charles Zubik, Sr., to transfer and issue Water Carrier Certificate W-364 (hereinafter referred to as W-364) to Pittsburgh Towing Company (hereinafter referred to as Pittsburgh). Pittsburgh was permitted to intervene in the action.

On February 18, 1966, this court filed a memorandum opinion setting aside and annulling the Commission's approval of the said transfer. (See 252 F. Supp. 167 for a complete statement of the facts upon which this court based its opinion.) Some of these facts which are relevant in these motions will be set out in this opinion.

W-364 was issued to Charles Zubik, Sr., on January 18, 1943. W-364 granted to Zubik, Sr., the right to conduct towing operations on certain inland waterways. Zubik, Sr., suspended services under W-364 on or about July 31, 1950, and from thenceforth the certificate became dormant (at least in Zubik, Sr.'s hands). Zubik, Sr., was approached by Edmund D. Osbourne to buy W-364, and on June 9, 1960, Zubik, Sr., entered into an

option agreement with Osbourne wherein for a consideration of $50.00 Zubik, Sr., gave to Osbourne the exclusive right of option to purchase at any time prior to December 31, 1960, for a purchase price of $100,000.00, W-364, provided the transfer was approved by the Commission. This transfer could not be made without complying with certain rules and regulations of the Commission.

On June 29, 1960, Zubik, Sr., at Osbourne's request, amended the option agreement and assigned W-364 to Pittsburgh, subject to approval by the Commission, with the understanding that upon the Commission's approval of the transfer Pittsburgh would issue to Zubik, Sr., 2,500 shares of its capital stock. Pittsburgh was formed in 1959 by Osbourne and the stock was issued to Osbourne (100 shares), to Douglas B. Meyers, an employee of Osbourne's (100 shares), and to a Francis X. Wiget (1 share). The change in the option agreement was made in an effort to facilitate the transfer of W-364. Osbourne had until December 31, 1960, to exercise his option to purchase the 2,500 shares from Zubik, Sr., on exchange for the $100,000.00 agreed upon in the option agreement of June 9, 1960. The Commission approved this transfer of W-364 on the theory that Zubik, Sr., was merely incorporating to operate his certificate.

It is clear that the change in the option agreement was a mere subterfuge to enable Zubik, Sr., and Osbourne to circumvent the transfer rules and regulations of the Commission, and this court so held when it entered its decree annulling the Commission's approval of the transfer, and permanently enjoining the Commission from allowing a transfer of W-364 to Pittsburgh

until such time as Zubik, Sr., complied with the rules and regulations of the Commission.

On March 25, 1966, pursuant to this court's memorandum opinion of February 18, 1966, the clerk of the court entered an order setting aside the Commission's orders authorizing the said transfer.

A notice of appeal was filed on this court's decision, and an appeal was taken to the Supreme Court of the United States. On November 7, 1966, the Supreme Court granted a motion to dismiss the appeal on the grounds that there had been a failure to make timely filing of the jurisdictional statement involved. A petition for rehearing was denied on December 5, 1966. At this time this court's stay of its prior order pending appeal was automatically set aside and the court's order became effective as of that date, December 5, 1966.

While the said appeal was pending, Zubik, Sr., died on August 25, 1966, and W-364 then passed to his executors, Charles Zubik, Jr., and Virginia Zubik Drambel (hereinafter referred to as the executors). On September 26, 1966, the executors, by affidavit, adopted the Zubik-Osbourne transaction and they requested the Commission to approve the transfer. By this time Osbourne had paid Zubik, Sr., a considerable sum of money on the option agreement.

On January 17, 1967, the Commission entered an order (reinstating a prior order) implementing this court's decision of February 18, 1966, whereby the said transfer to Pittsburgh was annulled and Pittsburgh was ordered to cease all operations under W-364, and the tariff which Pittsburgh had filed to operate under W-364 was stricken from the Commission records.

By this time Pittsburgh had ostensibly ceased all operations under W-364; however, on January 10, 1967, just prior to this final order of the Commission, the executors executed a power of attorney to Osbourne whereby Osbourne was permitted to file in Zubik's name a tariff to operate under W-364. The tariff which Osbourne filed by authority of the power of attorney and approved by the Commission was identical in every minute detail to the tariff under which Pittsburgh had conducted its illegal operations. In short, it was and is the same tariff.

John T. Walsh (an investigator for the Commission) testified that he had an interview with Osbourne at his office on February 13, 1967. The substance of this interview was that Osbourne had been given the power of attorney by the executors and that the said power of attorney authorized Osbourne to completely run W-364; that on February 12, 1967, Pittsburgh ceased all operations as such and that a similar operation was being conducted in the name of Charles Zubik, because Osbourne was afraid that if operations were not continued under W-364 the certificate might be revoked, and he wanted to recover $88,000.00 which he had paid Zubik, Sr., in installments on the option agreement; that the operations would continue until he got his money (assuming the operation was profitable) and after that he would continue in the capacity of manager; that a special bank account had been set up in Zubik's name, but that Osbourne could draw from the account; and that outside firms provided the towboats.

Walsh had another interview with Osbourne on February 15, 1967, and at this meeting Zubik, Jr., was present. This interview revealed that Zubik, Jr., was ad-

vised of major financial decisions in the W-364 operation, but that he did not devote all of his time to the operation since he was the manager of a concrete and gravel firm and had other problems with respect to the Estate. The Zubik Estate owned some towboats and barges, but these boats were not used in the operation of W-364.

Walsh had still another inteview with Osbourne on March 10, 1967. This interview revealed that Meyer (an employee of Osbourne) was acting as office manager of the operation; and that Osbourne made out all of the deposits to Zubik's account.

Walsh testified that he received a copy of the inventory of Zubik's estate and that W-364 was no listed as an asset thereon, nor were there any claims filed by Osbourne against the Estate.

The testimony of Edmund D. Osbourne and Charles Zubik, Jr., disclosed that there was a signed agreement (Exhibit 3), dated January 6, 1967, which agreement was signed by Western Rivers Corporation (hereinafter referred to as Western), by Edmund D. Osbourne, President, and accepted by the Estate of Charles Zubik, signed by Charles Zubik, Jr., Executor.

The agreement provided in part: "Western Rivers Corporation will undertake the management of Certificate W-364, operating same * * *."

Western is a corporation owned by Osbourne, which has not been in active operation before this date for some time and is really a shell, and when Osbourne was questioned with respect to its corporate powers he was unable to state that it had authority to manage any

such operation, and in fact, when read what purported to be its corporate powers, could point out no reference to any part that would grant such authority

Both Osbourne and Zubik admitted they told Walsh that Osbourne was the manager of the operation of Certificate W-364, and that the operation was really the Zubik Estate, and at no time advised Walsh of Western's position in the operation The testimony of Osbourne, Zubik, and other witnesses, conclusively shows that the operation under W-364 before January 1, 1967, and after January 1, 1967, was identical in every respect, except for the name under which the operation was conducted, and the name under which the bank account was kept and the billings made.

Both Osbourne and Zubik testified that the income from the operation after January 1, 1967, was placed in a bank account in Zubik's name, subject to withdrawal by checks signed by Osbourne, Osbournes' wife, and Zubik, Jr.; that Zubik had only drawn one, two or three checks on the account, and those checks were for such purposes as payment to the Commission for filing fees when the tariff was filed. Osbourne drew checks on the account in favor of Western, and Western paid all operating expenses amounting to some fifty-five hundred to six thousand dollars a month, twelve hundred dollars of which was paid each month to Osbourne.

An examination of the agreement of January 6th (Exhibit 3) discloses that it is in many ways a partnership agreement. As an example, it says:

> "The problem remains for *us* to reach an agreement which will protect all of *us* while keeping the

Authority in effect, as well as complying with the unhappy court order in St. Louis. * * * We agree particularly under a new law *we* cannot afford to allow the Authority to lapse. If we cannot continue the active life of the Certificate it becomes a liability for both of *us* instead of an asset for both of *us.*" It ends up by stating:

"If *you* will pledge yourselves to every co-operation, particularly with respect to additions to the Authority, *we* will pledge ourselves to the maintenance of its vigorous life."

In this connection, the "you" in the exhibit refers to the Zubik Estate.

The testimony of Osbourne and Zubik further disclosed that under their agreement if the operation of W-364 was unprofitable Osbourne would personally take care of all losses, holding the Zubik Estate harmless. While this is not included in Exhibit 3, both witnesses testified to this fact. On June 8, 1967, an affidavit was signed by Charles Zubik, Jr., Executor, and Virginia Zubik Drambel, Executrix, which affidavit was filed with the clerk of the court on June 19, 1967, and which affidavit states in part:

"Certificate W-364 originally issued to Charles Zubik in 1953, is being operated for the best advantage of the Zubik Estate, subject to the supervision of the courts of Allegheny County, Pennsylvania."

It is interesting to note that the affidavit does not say that Certificate W-364 is being operated *by* the Zubik Estate, but rather it *says for the best advantage* of the Estate. While the affidavit says the operation is

"* * * subject to the supervision of the courts of Allegheny County * * *", it is admitted that W-364 is not listed as an asset of the Estate, and no orders have been made by the courts of Allegheny County with respect to W-364 or its operation or anything in any kind pertaining thereto.

The preceding facts lead to one inescapable conclusion; that is, that Edmund D. Osbourne, through Charles Zubik, Jr. and Virginia Zubik Drambel, Executors of the Estate of Charles Zubik, is employing but another subterfuge, as he previously did with Pittsburgh Towing Company, to avoid compliance with the decree of this court and with the judgment and order of the Commission. This court's decree in this case had the effect of permanently enjoining Pittsburgh (Osbourne's alter ego) from conducting any operation under W-364 until it complied with the rules and regulations of the Commission. It is evident that Osbourne has not ceased his illegal operation under W-364, but has merely changed names, and is now operating in the same manner as before the court's decision, and using the Zubik name for operations instead of Pittsburgh as his alter ego. There has been a vain attempt to show that the operation of the certificate is now by Zubik, Jr., and not Osbourne, but the facts show otherwise.

In the final analysis, the only operation that could be and is continuing under W-364 at this time is that of Osbourne.

It has been argued that the United States may not bring the present injunction motion and that this court does not have jurisdiction over Osbourne who was not a

party to the primary action and did not intervene therein as the Zubiks did.

It is well settled that the courts of the United States have the inherent and statutory (28 USCA 1651) power and authority to enter such orders as may be necessary to enforce and effectuate their lawful orders and judgments, and to prevent them from being thwarted and interfered with by force, guile, or otherwise. *Dean Foods Co. v. Federal Trade Commission,* 384 U. S. 597; *Faubus v. United States,* 254 F. 2d 797 (CA 8); *United States v. Wallace,* 218 F. Supp. 290 (DC. Ala.). This rule applies whether or not the person charged with the violation of the judgment or decree was originally a party defendant to the action.

The intervenors and Osbourne have willfully and deliberately violated this court's decree and the order of the Interstate Commerce Commission of January 12, 1967, by employing deceptive and deceitful tactics. It clearly appears in the record of this case (and the plaintiffs have supplied an affidavit) that unless an injunction is issued the plaintiffs will suffer irreparable injury resulting from the respondents' obstruction of the lawful order and decree of this court and the consequent impairment of this court's integrity and the judicial process of the United States of America.

Although Charles Zubik, Jr., as Executor, and Virginia Zubik Drambel, as Executrix, of the Estate of Charles Zubik, Deceased, as intervenors, and Edmund D. Osbourne, were not parties to the proceedings to enjoin, set aside and annul Certificate No. W-364 (252 F. Supp. 162), it is conceded that they had actual knowledge of this court's decree entered in that case. Addi-

tionally, we find that they have been and are acting in concert with Pittsburgh Towing Company. This being the situation, our decree is binding upon them and the motion to enforce the judgment shall extend to them as well as the Pittsburgh Towing Company.

A motion to enforce judgment is a proper procedure to be utilized to compel compliance with the court's decision in a case of this type. *Eastern Central Motor Carriers Ass'n. v. U. S.*, 251 F. Supp. 483; *Movers Conference v. U. S.*, 251 F. Supp. 882.

For the foregoing reasons the motion to enforce judgment and commission's order with respect to Pittsburgh Towing Company, a corporation, Charles Zubik, Jr., Executor, and Virginia Zubik Drambel, Executrix, of the Estate of Charles Zubik, intervenors, and Edmund D. Osbourne, will be sustained and the injunction sought thereof entered.

In the light of the evidence and our findings and conclusions, we believe that the Interstate Commerce Commission should be afforded the opportunity to give further consideration to striking the tariff filed on behalf of the Zubik Estate. An appropriate order will be entered remanding this phase of the proceeding to the Interstate Commerce Commission, with directions to again consider whether the tariff in question should be stricken.

This memorandum opinion is hereby adopted by the court as its findings of fact and conclusions of law.

M. C. MATTHES
U. S. Circuit Judge

*Appendix A-1.*

ROY W. HARPER
U. S. District Judge

JAMES H. MEREDITH
U. S. District Judge

---

**Appendix A-1**

**Order**

**Filed July 31, 1967**

This cause having come on for hearing before the Court upon the motions of the United States of America and the Interstate Commerce Commission, for an Order enforcing the prior Order of this Court entered herein, and also the Order of the Interstate Commerce Commission entered pursuant to the Order of this Court, and for a temporary injuction, and having been heard upon the pleadings, evidence, and arguments of counsel;

WHEREFORE the Court being fully informed in the matter finds:

I.

That this Court has jurisdiction of this action under Title 28, Sections 1336, 1345, 1651, 2321 and 2323 U. S. Code, and Title 49, Sections 42 and 916.

II.

That Pittsburgh Towing Company, a Pennsylvania Corporation, is an intervenor in this proceeding and is within the jurisdiction of this Court and, as a common carrier by water, subject to Part III of the Interstate Commerce Act (Title 49, Chapter 8, U. S. Code).

*Appendix A-1.*

III.

That at all times herein mentioned, Edmund D. Osbourne did control and operate said Pittsburgh Towing Company and other companies, and did and is controlling and operating the water carrier rights of Charles Zubik evidenced by Certificate W-364 of the Interstate Commerce Commission and now held by Charles Zubik, Jr. as executor and Virginia Zubik Drambel as executrix of the Estate of Charles Zubik, deceased.

IV.

That at all times herein mentioned, Charles Zubik, Jr., executor, and Virginia Zubik Drambel, executrix of the Estate of Charles Zubik, intervenors in this proceeding and within the jurisdiction of this Court and, as a common carrier by water, subject to Part III of the Interstate Commerce Act, did and are participating in aiding and abetting the unlawful control and operation by Edmund D. Osbourne of the water carrier rights in Certificate W-364.

V.

That in disregard of the Order of this Court entered on March 25, 1966 prohibiting the transfer of the Certificate W-364 to Pittsburgh Towing Company, which was then and still is controlled and operated by Edmund D. Osbourne, and in disregard of the Order of the Interstate Commerce Commission of January 12, 1967 in Finance Docket No. 21193, requiring the cessation of further operations of Pittsburgh Towing Company under the authority of Certificate No. W-364, Pittsburgh Towing Company, Edmund D. Osbourne, The Charles Zubik Estate by Charles Zubik, Jr., executor and Vir-

ginia Zubik Drambel, executrix seek to accomplish that which could not be accomplished lawfully by permitting, aiding and abetting Edmund D. Osbourne, owner of Pittsburgh Towing Company and other companies to control and operate the water rights in Certificate W-364 as manager of the Estate of Charles Zubik.

VI.

That the acts and operations of all of said parties constitute violations of the Interstate Commerce Act, Title 49, Sections 42 and 916, U. S. Code and the prior judgment of the Court and as such are subject to be enjoined by this Court under Title 28, Sections 1336, 1345, 1651, 2321 and 2323, U. S. Code which Court was convened pursuant to Title 28, Sections 2281 and 2284 of the U. S. Code.

WHEREFORE, it is ordered:

(a) That the intervenor Pittsburgh Towing Company, a corporation, its agents, employees and representatives, and all persons, firms, companies and corporations and their respective officers, agents, servants, employees, and representatives in active concert or participation with them, be perpetually enjoined from in any manner or by any device, directly or indirectly, transporting or holding out to transport property in interstate commerce for compensation as a for-hire common carrier by water, under the authority of Certificate No. W-364 issued by the Interstate Commerce Commission;

(b) That Edmund D. Osbourne, acting as an individual or under any trade or fictitious name, or as a member of a real or purported partnership, or in con-

trol of, or as agent of any corporation, entity, or by any other devious means, devices, and subterfuges, be perpetually enjoined and restrained from in any manner or by any device, directly or indirectly, transporting, holding out to transport, or aiding and abetting transportation, of properties in interstate commerce for compensation as a for-hire, common carrier by water, under the authority of Certificate No. W-364 issued by the Interstate Commerce Commission or in the name of Charles Zubik, Jr., executor and Virginia Zubik Drambel, executrix of the Estate of Charles Zubik, deceased.

(c) That the intervenors Charles Zubik, Jr., executor and Virginia Zubik Drambel, executrix of the Estate of Charles Zubik, their agents, employees and representatives, in active concert or participation with them, be perpetually enjoined and restrained from in any manner or by any device, directly or indirectly, aiding and abetting or allowing defendants Pittsburgh Towing Company and Edmund D. Osbourne to transport or to hold out to transport property in interstate commerce for compensation on water, as a for-hire common carrier by water, under the authority of Certificate No. W-364 issued by the Interstate Commerce Commission.

Dated this 31st day of July, 1967, at St. Louis, Missouri:

M. C. MATTHES
United States Circuit Judge

ROY W. HARPER
United States District Judge

JAMES H. MEREDITH
United States District Judge

## Appendix A-2

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MISSISSIPPI VALLEY BARGE LINE COMPANY, AMERICAN COMMERCIAL LINES, INC., and UNION BARGE LINES CORPORATION,
Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants,

and

PITTSBURGH TOWING COMPANY, CHARLES ZUBIK, JR., as Executor, and VIRGINIA ZUBIK DRAMBEL, as Executrix, of the Estate of CHARLES ZUBIK, Deceased,
Intervenors.

No. 64C 3 (1)

### Order

Filed July 31, 1967

The motion of the plaintiffs to require defendant, Interstate Commerce Commission, to show cause why it should not set aside its order of February 9, 1967, refusing to strike tariff of Charles Zubik, Jr., Executor, and Virginia Zubik Drambel, Executrix, and to show cause why such tariff should not be stricken from the Commission's files, filed on April 6, 1967, has been submitted to the court.

In view of the testimony heard by the court in the motions to enforce judgment and Commission order and for a preliminary injunction filed by the United States

of America and the Interstate Commerce Commission with respect to the tariff filed by Charles Zubik, Jr., Executor, and Virginia Zubik Drambel, Executrix, the cause is remanded to the Interstate Commerce Commission with directions to give further consideration to the striking of the tariff.

M. C. MATTHES
U. S. Circuit Judge

ROY W. HARPER
U. S. District Judge

JAMES H. MEREDITH
U. S. District Judge

## APPENDIX B.

### Memorandum Opinion

Before MATTHES, Circuit Judge. HARPER and MEREDITH, District Judges. HARPER, District Judge.

Filed February 18, 1966

This action was brought under 28 USCA 1336 and 2284 on January 7, 1964, by the plaintiffs to enjoin, set aside, annul and suspend orders of the Interstate Commerce Commission (hereinafter referred to as the Commission), dated April 9, 1963, and December 19, 1963, and served April 24, 1963, and January 3, 1964, respectively, in Finance Docket 21193, *Pittsburgh Towing Company, Certificate Transfer — Charles Zubik,* which authorized transfer and issuance of Certificate W-364 to the Pittsburgh Towing Company.

Pursuant to 28 USCA 2321-2325, a three-judge court was constituted. On February 18, 1964, on its own motion, the Commission re-opened the hearing before it and this court stayed proceeding pending disposition of matter by the Commission. In its decision dated March 19, 1965, the Commission, with four commissioners dissenting, approved the transfer, but stayed the effect of its order until the termination of the proceedings before this court and the meeting of certain conditions by Pittsburgh.

Thereafter, on June 10, 1965, the plaintiffs filed an amended petition seeking to enjoin, set aside, annul and suspend orders of the Interstate Commerce Commission dated September 9, 1960, April 9, 1963, December 19, 1963, and March 19, 1965, in said matter. On October 28, 1965, the court held its hearing in this matter.

$100,000.00, the water carrier certificate involved in this matter, provided the transfer was approved by the Commission. The option agreement further provided that if Osbourne gave notice in writing to Zubik prior to December 31, 1960, of his election to exercise the option, Zubik would apply to the Interstate Commerce Commission for approval of the proposed transfer and assignment of the said water carrier certificate to Osbourne or his designee, utilizing such counsel as Osbourne might approve in seeking such transfer.

On June 29, 1960, Zubik, at Osbourne's request, amended the option agreement and assigned the Water Carrier Certificate W-364 to Pittsburgh, subject to approval by the Commission, with the understanding that upon the Commission's approval of the transfer Pittsburgh would issue to Zubik twenty-five hundred shares of its capital stock. This change in the agreement was made in an effort to facilitate the transfer of the certificate. Osbourne had until December 31, 1960, to exercise his option to purchase the twenty-five hundred shares from Zubik in exchange for the one hundred thousand dollars agreed upon in the option agreement of June 9th. As will be pointed out later, the reason for the injection of the corporate device in the manner in which it was done was a mere subterfuge to circumvent Commission regulations pertaining to transfer.

On July 8, 1960, when the application for the transfer was filed by Zubik, Paragraph 2(n) of the application stated that the transferee would be officered by Zubik, Osbourne and other persons. The record shows that Zubik at no time, neither before nor after transfer, was an officer of the corporation. Paragraph 2(o) of

the application states: "Transferee is a new corporation which has been organized for the purpose of acquiring and operating the Certificate W-364 * * *."

The record discloses that the corporation was organized in November of 1959, the agreement with respect to Osbourne acquiring the certificate was entered into on June 9, 1960, and that the corporation did not enter the picture until June 29, 1960. The record further discloses that on June 8, 1960, the two hundred one shares of stock which at that time had been issued in the corporation were all owned by Osbourne, and that Zubik did not own any of said stock until September 19, 1960. The record further discloses that Zubik owned some eight towboats and four barges at the time of the application and that Pittsburgh owned no towboats, no barges, and had little if any, capital.

On July 7, 1960, Zubik sent notices to all his supposed competitors, which notice read as follows: "This is to notify you that for personal reasons I have applied to the Interstate Commerce Commission for permission to change my certificate from a sole proprietorship to a corporation, of which *I am* the owner, Pittsburgh Towing Company."

This statement to the effect that he (Zubik) was the owner of this corporation is completely refuted by the record, which shows that on that date Osbourne was the sole owner of the corporation. When the Commission on September 9, 1960, approved the transfer of the certificate it had not seen and was not aware of the option agreement of June 9, 1960, the amendment to the option agreement of June 29, 1960, the contents of the articles of incorporation showing the in-

corporators of Pittsburgh, nor the true facts with respect to the ownership of the Pittsburgh stock at said time. The Commission did not see the agreements between Zubik and Osbourne for the sale of this certificate until during the hearing held in this matter on March 27 and 28, 1962, when the Bureau of Inquiry and Compliance participated. Those documents were produced at that hearing by the parties, reluctantly, and over strenuous objection.

Transfer of water carrier certificates is provided for in 49 USCA 912, which reads in part: "* * * any such certificate or permit may be transferred in accordance with such regulations as the Commission shall prescribe for the protection of the public interest and to insure compliance with the provisions of this chapter."

Pursuant to said section the Commission has promulgated regulations 49 CFR 306.1 through 306.10 pertaining to the transfer of water carrier certificates. 49 CFR 306.9, one of the said regulations, provides:

> "The transfer of any certificate or permit under which operations are not being conducted at the time of the proposed transfer will be approved only upon a showing that the suspension of operations was caused by circumstances over which the holder of the certificate or permit had no control, and that the water carrier operations authorized under the certificate or permit sought to be transferred will be consistent with the public interest."

The only offer that Zubik has ever made concerning circumstances causing the suspension of operations was the bar assertion in the application that the sus-

pension was caused by "circumstances over which your petitioner had no control * * *." There was a complete void of any showing that the resumption of operations under the certificate would be in the public interest. Nevertheless, on September 9, 1960, the Commission granted its initial approval of the transfer "for good cause appearing therefor."

As was mentioned above, hearings on the application were twice re-opened, and the option agreements were disclosed. It was during these hearings that the questions concerning the cause of the suspension of the operations and Pittsburgh's fitness to maintain operations were raised. The Commission took official notice of the fact that business conditions were unfavorable for water carriers during the 1950's. This notice completely ignores a fact well taken by the dissenting members of the Commission that Zubik's competitors underwent the same unfavorable conditions during the 1950's, and are today operating profitably with no interruption of service during the difficult years.

The Commission's regulations provide that a required exhibit to be submitted with the application for transfer is "a copy of all contracts or other written instruments entered into, or proposed to be entered into, pertaining to the proposed transfer * * *." 49 CFR 306.4(b).

Nothing could fit this description more clearly than the option agreements entered into between Zubik and Osbourne. It is the option agreements which contain the evidence showing the actual purpose for the transfer of the certificate to Pittsburgh. No reasonable reader of the record before the Commission and this court

could come to any conclusion regarding the purpose of the application of transfer of Water Carrier Certificate W-364 other than that of transferring ownership of the certificate from Zubik to Osbourne and effectively circumventing the regulations of the Commission. The use of the corporate device and the transfer of the certificate to Pittsburgh was an attempt on the part of Zubik and Osbourne to transfer ownership of the certificate without subjecting themselves to the procedure specifically created for examining applications for transfer of ownership. Yet the Commission glossed over the fact that the option agreements were missing and not timely brought to its attention by stating that these agreements were not vital to the transfer.

Subsequent hearings resulted in a decision by a hearing examiner against the transfer and the Commission refusing to accept the findings and decision of the examiner.

This court cannot accept the Commission's refusal to heed its own regulations and the clear evidence of the attempt to deceive the Commission. Legislative regulations, created by a Federal agency pursuant to congressional authority, having the force of law. *Columbia Broadcasting System v. U. S.*, 316 U. S. 407, 417-419 (1942). The agency which promulgates the rule is as bound by its terms as is the general public. *Columbia Broadcasting System v. U. S.*, 316 U. S., 422; *McKay v. Wahlenmaier*, 226 F. 2d 35, 43. The Commission has itself held that it is bound by its rules. *United States Lines Co., Certificate Transfer*, 260 ICC 355, 358. Therefore, any action taken by the Commission is invalid unless the rules pertaining to the action are followed.

*Appendix B.*

Besides the above-mentioned regulations concerning documents pertaining to the proposed transfer (49 CFR 306.4(b)), and a showing that the suspension of operations was caused by circumstances over which the certificate holder had no control (49 CFR 306.9), the applicant is required to submit "any additional information to show that the proposed transferee is fit, willing, and able *properly* to perform services authorized by the certificate or permit sought to be transferred." 49 CFR 306.3(o). (Emphasis added.)

There was a total absence of information in the application for transfer showing that Pittsburgh was in any way financially fit to carry on the operations authorized by the certificate. Nothing more than the intention of the supposed owner of all the stock of Pittsburgh to make some arrangement appears in the application. Zubik stated that he was to be the holder of all of the issued and outstanding stock, when in truth he was not and never intended to be. Pittsburgh was Osbourne's corporation. The only connection with Pittsburgh that Zubik contemplated was a brief sojourn as stockholder while Osbourne purchased Zubik's stock, which he received in exchange for the certificate.

The Commission's reference to Pittsburgh's improving financial status is totally immaterial. So also is Zubik's temporary ownership of Pittsburgh stock after approval of the application. The Commission was required to view the parties at the transfer application. Zubik concealed the options from the Commission as long as he could. The options changed the entire nature of the proceedings from a change in the *form* of ownership to a change in ownership. Totally different procedures and attitudes govern when change in the owner-

ship of the certificate is attempted. Zubik and Osbourne attempted to circumvent the regulations controlling the transfer of ownership of a certificate. Information was concealed from the Commission. The plan clearly was to transfer the certificate from Zubik, a sole proprietorship, to a corporation owned by Osbourne when the application was filed, and to be owned by Osbourne when the transfer was consummated.

The contention of Zubik, Osbourne and the Commission that this matter involves merely a change in the *form* of ownership completely ignores the option agreement with its obvious intentions. Deceit was perpetrated by Zubik in his letter to his competitors in July of 1960. The Commission allowed a concealment and violation of its rules in the application for transfer of the certificate on July 8, 1960. The Commission cannot ignore its own rules under the facts before it.

In view of the regulations and the record, the orders of the Commission approving the transfer of Water Garrier Certificate W-364 are hereby set aside and annulled.

A decree in accordance with this opinion may be submitted by the plaintiffs on notice unless consultation among the parties shall bring about a waiver of notice.

(s) M. C. MATTHES
U. S. Circuit Judge

(s) ROY W. HARPER
U. S. District Judge

(s) JAMES H. MEREDITH
U. S. District Judge

## APPENDIX B1

### Judgment and Decree of the Court

Filed March 25, 1966

This cause came on for final hearing on the Complaint herein praying for a judgment to enjoin, set aside, annul and suspend Orders of the Interstate Commerce Commission dated September 9, 1960, April 9, 1963, December 19, 1963 and March 19, 1965 thereby restraining the transfer of Certificate No. W-364 to Pittsburgh Towing Company.

Pursuant to Sections 2321-2325 of Title 28 of the United States Code a three-judge court consisting of the Honorable M. C. Matthes, Judge of the United States Court of Appeals for the 8th Circuit, and the Honorable Roy W. Harper and Honorable James H. Meredith, Judges of the United States District Court for the Eastern Judicial District of Missouri, Eastern Division was designated. The issues having been duly heard by and evidence having been heard before said Court, upon consideration duly been given to all the issues before said Court and a decision thereon having been duly rendered, and upon the finding by this Court that Pittsburgh Towing Company had failed to meet the requirements of the Defendant Interstate Commerce Commision's regulations set forth in 49 C.F.R., 306.1 through 306.10 and Part 3 of the Interstate Commerce Act, 49 U.S.C. Section 901 et seq,

IT IS ORDERED, ADJUDGED AND DECREED:

1) That the Orders of the Defendant Interstate Commerce Commission dated September 9, 1960, April 9, 1963, December 19, 1963 and March 19, 1965 are hereby set aside, annulled and suspended.

2) That the Defendant Interstate Commerce Commission is permanently enjoined from transferring water carrier certificate No. W-364 to Intervenor Pittsburgh Towing Company, as authorized by said orders.

M. C. MATTHES
United States Circuit Judge

ROY W. HARPER
United States District Judge

JAMES H. MEREDITH
United States District Judge

## APPENDIX C

SERVICE DATE
January 17, 1967

At a General Session of the INTERSTATE COMMERCE COMMISSION held at its office in Washington, D. C., on the 12th day of January, A.D. 1967.

Finance Docket 21193

PITTSBURGH TOWING COMPANY
—CERTIFICATE TRANSFER—
CHARLES ZUBIK

*It appearing,* That by opinion filed on February 18, 1966, and judgment entered on March 21, 1966, the United States District Court for the Eastern District of Missouri, Eastern Division, in Civil Action No. 64 C 3(1), *Mississippi Valley Barge Line Co. v. United States,* annulled the orders of the Commission of September 9, 1960, April 9, 1963, December 19, 1963, and March 19, 1965, in the above-entitled proceeding; and

*It further appearing,* That by order dated March 18, 1966, and served May 5, 1966, the prior orders of the Commission of September 9, 1960, April 9, 1963, December 19, 1963 and March 19, 1965, were, pursuant to said judgment of the Court, vacated and set aside, effective 75 days from the date of service thereof; and

*It further appearing,* That the United States District Court for the Eastern District of Missouri in said Civil Action No. 64 C 3(1) issued an order, dated June 24, 1966, staying its prior judgment of March 21, 1966, pending disposition of the appeal of Pittsburgh Towing Company to the Supreme Court of the United States; and that Notice of said stay was served by the Commission on July 19, 1966; and

*It further appearing,* That the Supreme Court of the United States on November 7, 1966, dismissed said appeal for failure to comply with the time requirements for docketing an appeal, and on December 5, 1966, denied Pittsburgh Towing Company's petition for reconsideration; that the mandate of the Supreme Court has been sent to the district court; and that the stay issued by the district court on June 24, 1966, is no longer in effect;

*It is ordered,* That the order of the Commission dated March 18, 1966, and served May 5, 1966, vacating and setting aside the prior orders of September 9, 1960, April 9, 1963, December 19, 1963, and March 19, 1965, be, and it is hereby, reinstated, effective upon the date of service hereof; and

*It is further ordered,* That Pittsburgh Towing Company be, and it is hereby, ordered forthwith to cease operations conducted pursuant to the prior orders, above described, which have been vacated and set aside; and

*It is further ordered,* That Pittsburgh Towing Company Tariff I.C.C. No. 2, and Supplement Nos. 13, 14, 21 and 22 thereto be, and they are hereby, stricken from the Commission's files, for the reason that Pittsburgh Towing Company is no longer authorized to conduct the operations covered by said tariff and supplements; and

*It is further ordered,* That Pittsburgh Towing Company shall issue a supplement to its Tariff I.C.C. No. 2, within five days from the date of service of this order and reproduce therein this order in its entirety, including the service date;

*Appendix C.*

*And it is further ordered,* That upon service of this order, the use of the rates and provisions published in Tariff I.C.C. No. 2, as amended, by Pittsburgh Towing Company is hereby prohibited, and that such carrier be, and it is hereby, ordered to refrain from performing tansportation for which it has no effective rates on file with the Commission by reasons of this striking order.

By the Commission.

H. NEIL GARSON
Secretary

[SEAL]

## APPENDIX D

SERVICE DATE
April 16 1965

## PITTSBURGH TOWING COMPANY —CERTIFICATE TRANSFER— CHARLES ZUBIK

*Decided March 19, 1965*

1. Upon reconsideration, findings in the prior report, 217 I.C.C. 661, amplified and affirmed. Provision made for issuance of a certificate to the transferee superseding the certificate transferred. Conditions prescribed.
2. Petition of transferee to vacate and set aside the order reopening the proceeding for reconsideration, denied.

Appearances as shown in the prior report.

REPORT OF THE COMMISSION ON RECONSIDERATION

WALRATH, *Commissioner*:

Issuance of a water carrier certificate of public convenience and necessity to the transferee superseding the certificate transferred in this proceeding was temporarily enjoined by the United States District Court for the Eastern District of Missouri, Eastern Division, in civil action No. 64 C 3(1), *Mississippi Valley Barge Line Co. v. United States*, — F. Supp. —. Subsequently, on its own motion, on February 18, 1964, division 3, acting as an Appellate Division, reopened the proceeding, which was recalled by the Commission at the request of the

division because of the policy matters involved regarding the transfer of water carrier certificates. On March 10, 1964, transferee filed a petition to vacate and set aside the order of February 18, 1964, to which interveners[1] replied. A stipulation has been lodged with the court that, if we affirm approvel of the transfer, the proceeding will be stayed until the further order of the court, and the temporary injunction has been dissolved. In view of the stipulation and our conclusions, transferee's petition will be denied.

This proceeding arose from an application filed July 8, 1960, jointly by Charles Zubik, for himself, transferor, and Charles D. Osbourne, managing director, for Pittsburgh Towing Company, transferee, both of Pittsburgh, Pa., for approval under section 312 of the Interstate Commerce Act and the regulations thereunder,[2] hereinafter called the transfer regulations, of the transfer of the certificate dated January 18, 1943, issued to the transferor in No. W-364.

The certificate in question authorizes operation as a common carrier by towing vessels, in interstate or foreign commerce, in the performance of general towage between ports and points on the Ohio, Youghiogheny, Allegheny, Monongahela, and Kanawha Rivers.

---

1. American Commercial Barge Line Company, and Union Barge Line Corporation.

2. Rules and Regulations Governing Transfers of Certificates and Permits to Operate as a Water Carrier in Interstate or Foreign Commerce, contained in the Commission's order of August 4, 1943 (49 CFR 306), section 306.4(f) of which was added by order of May 3, 1950, now superseded by order of October 31, 1963, which deleted said section and amended section 306.6(b) and (c).

The transferor has suspended operations subject to the act after World War II, although his towboats had been operating around Pittsburgh. He had been relieved in 1950 from filing reports until such time as operations subject to the act were resumed. The traneferee was a new corporation organized for the purpose of acquiring the certificate and operating thereunder. The transaction did not require approval and authorization under section 5(2) of the act. No representations in the proceeding had been made by State authorities. Competing water carriers had been notified, and no objection to granting the application had been presented. No hearing was deemed necessary.

The transfer was approved by order of the Commission, division 4, dated September 9, 1960. Consummation was effected on November 17, 1960, and evidence of the transfer was filed, as provided in the order. Section 306.6(e) of the transfer regulations provides that, upon receipt of such evidence, an appropriate certificate superseding the certificate transferred will be issued.

After the prescribed period for filing petitions had expired and the order of September 9, 1960, had become effective, competing water carriers named in footnote 1 were stirred to action by transferee's publication of towing rates lower than theirs, to become effective upon consummation. They filed a petition dated October 24, 1960, for leave to intervene and for reopening and vacation of the order of September 9, 1960. The petition was denied by order of the Commission, Commissioner Tuggle, dated December 30, 1960, but, by order dated September 13, 1961, upon consideration of additional petitions by the same carriers, and reply by transferee, division 3 reopened the proceeding for further consideration and

hearing, and stayed issuance of the certificate to transferee pending final disposition of the matter. Petitioners were permitted to intervene, but the order of September 9, 1960, was not vacated. A hearing, in which the Bureau of Inquiry and Compliance participated, was held. The hearing examiner recommended that the order approving the transfer be set aside and that the application be denied.

In the report, 317 I.C.C. 661, decided April 9, 1963, hereinafter called the prior report, after hearing and further consideration, a majority of division 3 affirmed the order by division 4 approving the transfer. A petition of interveners for reconsideration was denied by an order of division 3, acting as an Appellate Division, entered December 19, 1963. On or about January 8, 1964, one of the interveners filed the above-mentioned suit to enjoin, set aside, annul, and suspend the orders of April 9, 1963, and December 19, 1963.

Interveners claim that errors were committed (1) by division 4, prior to hearing, in finding transferee fit, willing, and able properly to perform the service authorized by the certificate, based on information and evidence submitted with the application; and in taking official notice that transferor's suspension of operations was due to circumstances beyond his control; (2) by division 3, upon hearing and further consideration, in failing to consider the application *de novo,* wholly disregarding the prior approval and consummation and equities arising therefrom; in concluding that approval was not induced by misrepresentation of the nature of the transaction or of transferee's financial resources; in concluding, appropos of transferee's fitness, that its method of operation had not been shown to be unlawful (though

this was not an appropriate proceeding in which to determine the question); and (3) by both divisions, in failing to require a showing that re-activation of the long-suspended operations by transferee would meet a public need not otherwise being adequately met.

The pertinent facts are set forth in some detail in the examiner's report and in the prior report, and will be restated here only to the extent necessary for clarity of discussion.

Evidence submitted with the application included an assignment by Zubik, dated June 29, 1960, of the certificate in question to transferee, subject to approval by the Commission of the transfer. Information furnished was to the effect that transferee was organized November 4, 1959, with an authorized capital stock of 5,000 shares; that 2,500 shares would be issued to Zubik as compensation for the certificate; and that all or part of the remaining 2,500 shares would be sold and proceeds therefrom used to obtain necessary towing power units and other equipment. The stock had not been issued, officers had not been elected, and transferee would not be a carrier until the transfer of the certificate was approved. Officers and directors would not have any interest, control, or affiliation with any other common carrier subject to the jurisdiction of the Commission. Formal resolutions of stockholders or directors had not been adopted since Zubik would be the holder of all of the stock issued and outstanding on the date of consummation. It was stated that transferee would have as officers Zubik, Osbourne (who holds a master's certificate), and other persons experienced in the profession of river navigation. Zubik owned eight towboats and four barges. Transferee proposed to acquire modern

towing power units, but it was not known, with certainty, at that time from whom the units would be acquired. As the cause of suspension of transferor's operations, economic conditions were mentioned, and applicants asked that the right to be transferred and placed upon an active operating basis, and that the previously mentioned relief from filing reports be vacated.

At the bottom of the controversy in this proceeding is Zubik's notice to competitors, dated July 7, 1960. The controversy has caused the cross-filing of more than 30 pleadings by interveners and applicants, 2 rate proceedings,[3] 2 antitrust proceedings,[4] and the aforementioned suit.

Section 306.4(f) of the transfer regulations, as amended May 3, 1950, required a showing that notice of

---

3. *Towing Rates between Points on the Ohio River,* 315 I.C.C. 583, decided February 14, 1962, in which transferee's schedules were found not shown to be just and reasonable; and *Towing Rates, Pittsburgh Towing Co.,* 321 I.C.C. 366, decided November 22, 1963, in which increased bargeload towing rates, when applied in connection with exclusive use of outside towing, were found to be just and reasonable and otherwise lawful.

4. Docket No. 34155, Pittsburgh Towing Company *v.* Union Barge Line Corp. et al; and civil action No. 63-208, Pittsburgh Towing Company and Edmund D. Osbourne *v.* Union Barge Line Corp. et al., in the United States District Court for the Western District of Pennsylvania. The former, alleging conspiracy under the antitrust laws to destroy transferee, was dismissed by the Commission, Chairman Walrath, by order dated March 11, 1963, at the request of transferee-Complainant. The latter, alleging similar antitrust violations, was dismissed by the court January 21, 1964, for the reason that the allegations should be determined initially by the Commission under the primary jurisdiction doctrine.

filing of the application had been served upon all known waterline competitors. No form for the notice was prescribed, and applicants made the required showing. This provision has since been deleted by order of division 3, effective January 1, 1964, and pursuant to amended section 306.6(c), in those proceedings in which no oral hearing is held, if the application is approved, prior to the effective date, a synopsis of the order of approval (composed by the Commission) is published in the Federal Register.[5] Section 306.6(b) has further been amended to require applicants to serve copies of the applications on the Governors of the States in which any port or point served by the transferor is located, rather than to supply copies to the Commission to make such service.

Zubik, who neither reads nor writes, except his name, relies on assistants, particularly his young daughter, to read to him. The language of the notice was chosen by him from several drafts prepared and read to him by Osbourne as follows:

---

5. If the regulations, as amended, effective January 1, 1964, had been effective when the application was filed herein, in lieu of the notice described below, a synopsis of the authority granted would have been published in the Federal Register substantially as follows: By order of September 9, 1960, division 4 approved the transfer to Pittsburgh Towing Company, Pittsburgh, Pa., of the operating rights in Certificate No. W-364, issued January 18, 1943, to Charles Zubik, also of Pittsburgh, authorizing operation as a common carrier by towing vessels, in interstate or foreign commerce, in the performance of general towage between ports and points on the Ohio, Youghiogheny, Allegheny, Monongahela, and Kanawha Rivers. Applicants' attorney: Ernie Adamson, Box 62, Middleburg, Va.

*Appendix D.*

This is to notify you that for personal reasons, I have applied to the Interstate Commerce Commission for permission to change my certificate from a sole proprietorship to a corporation of which I am the owner, Pittsburgh Towing Company.

Based on the application and additional facts disclosed at the hearing, the notice might have read somewhat as follows (it is not intended to imply that such a detailed notice was required):

This is to notify you that for personal reasons, I have applied to the Interstate Commerce Commission for permission to change my certificate from a sole proprietorship to a new corporation, Pittsburgh Towing Company, organized for the purpose of acquiring and operating the certificate, which will issue to me the first 2,500 shares of its authorized capital stock of 5,000 shares, as compensation for the certificate.

The new corporation, which will not become a carrier until this transfer is approved, will be managed by Edmund D. Osbourne, who does not have any interest, control or affiliation with any other carrier subject to the jurisdiction of the Commission. He holds a master's certificate and is experienced in transportation of property by water for hire. He has discussed this matter with the Commission's staff, and he is better qualified than I to direct this operation.

I have granted him an option to purchase my shares after aprqval of the transfer for $100,000 payable $10,000 in cash following exercise of the option prior to December 31, 1960, and the balance in seven equal consecutive annual installments.

The corporation does not own or lease any vessels or other transportation facilities at this time. However, it proposes to acquire by lease, charter or purchase several modern towing power units, a major portion of the necessary funds for which is proposed to be obtained from the sale of part or all of the other authorized but unissued stock.

Osbourne purchased Zubik's stock in transferee on December 31, 1960. Interveners' position is that the intended Osbourne ownership of transferee raised questions of fitness and ability and of public interest not raised by Zubik ownership, and that had they been notified that, after the transfer, transferee would be Osbourne-owned, they could have successfully opposed the application, not that an Osbourne-owned transferee could do anything that a Zubik-owned (and Osbourne managed) transferee could not have done, or that an Osbourne-owned reactivation of the rights would affect, or has affected, their operations competitively, if at all, any differently from an Osbourne-managed Zubik reactivation. The essential futility of interveners' position will be considered later. Interveners' position assumes that they were entitled, as of right, to notice of Osbourne's intentions, and that, if they had timely filed a protest, they would have been entitled to an oral hearing. Neither assumption is correct. They are based on a misconception of the nature of transfer proceedings not subject to section 5.

The failure of the order of September 3, 1961, reopening the proceeding, to describe the purpose of the further consideration and hearing doubtless gave rise to some misunderstanding. It seems apparent that the

primary purpose was to determine whether approval had been obtained through misrepresentation or other fault of transferee or Osbourne and should be set aside.

The circumstances of this particular transfer may better be appreciated in the light of certain policy matters involved in transfers of operating rights not subject to section 5, with particular reference to transfers of water carriers certificates. Many such transfers, and many more similar transfers of motor carrier operating rights under section 212(b), and of freight forwarder authority under section 410(g), and rules and regulations prescribed under each section (see 49 CFR 179 (motor carriers) and 49 CFR 415 (freight forwarders), have been approved, but few decisions by the Commission or the courts dealing therewith have been printed. It may be well, therefore, to examine some of the attendant procedures and practices, and the interests which carriers other than the immediate parties to such transfers may have therein.

*The nature and limitations of transfer proceedings.* When part III of the act was enacted in the Transportation Act of 1940, and section 5(13) was amended to include water carriers subject to that part, Congress provided in section 312 for the transfer of water carrier certificates, under regulations to be prescribed, in transactions not subject to section 5, as follows:

> Except as provided in this part, any such certificate or permit may be transferred in accordance with such regulations as the Commission shall prescribe for the protection of the public interest and to insure compliance with the provisions of this part.

The language of section 312 is similar to that used in section 212(b) of the Motor Carrier Act, 1935, and it intent was doubtless similar, namely, to facilitate transfers not subject to section 5. Section 312 does contain the words "for the protection of the public interest," not contained in section 212(b), but these words would appear to amount to the expression of the same congressional intent implied under section 212(b), "that operating rights might be freely transferred so long as the public interest was not harmed thereby." See *Stearn and Hartman v. United States,* 87 F. Supp. 596, 601 (1949).

Since the statutory language is essentially similar, the transfer regulations under section 312 are similar to those under section 212(b)[6] Each requires that applicants make specified showings, principally that transferee is fit, willing, and able properly to perform the service authorized by the certificate sought to be transferred and to conform to the requirements of the act and the Commission's regulations.

In acting on the transfers not subject to section 5, the Commission depends mainly on information and evidence submitted by applicants. Rule 1.40 of the General Rules of Practice requires protests against applications to be filed promptly and as here pertinent permits the disposition of applications to be made without regard thereto. Transfers are not required to be determined on a record after opportunity for hearing. Under the prescribed regulations, the Commission determines whether or not a hearing is necessary. Hearings are rarely assigned.

---

6. Rules and Regulations Governing Transfers of Rights to Operate as a Motor Carrier in Interstate or Foreign Commerce (49 CFR 179).

*Appendix D.*

In civil action No. 2431, *Brooks Transp. Co., Inc. v. United States,* F. Supp. , decided May 13, 1957, where the United States District Court for the Eastern District of Virginia was considering whether competing carriers were entitled to any notice, hearings, or other procedural steps, as of right, under section (212b), the court said:

> the Congress evidently thought the public concern to be too slight to demand the close scrutiny of a full-dressed inquiry. For these cases an ex parte application, under the supervision of the Commission, was deemed adequate. This construction of the Act is underpinned by its legislative history and is confirmed by the practice of the Commission for more than a score of years. * * * prior notice of, and participation in, the small transfer proceeding need be accorded only to the immediate parties. If other persons are not entitled to take part originally, they would not logically be entitled, as of right, to subsequent participation and stay.

All transfers under section 312 and most transfers under section 212(b), are made to new, noncarrier entities. The transferee acquires only such rights as the transferor possessed. A heavy caseload of proceedings under other sections, having a greater impact on the public interest than such transfers, and a need to make reasonably quick determinations, impose practical restrictions on the time, resources, and staff which can be devoted to individual applications. Unnecessary duplication of effort must be avoided, and discretion to reopen such proceedings and assign hearings must be used sparingly. Bureau participation must necessarily be limited to those which present serious questions of fit-

ness of the new entities. If competing carriers are permitted to intervene, the doctrine that they are admitted to the proceeding as it stands, and in respect of the pending issues, but are not permitted to enlarge those issues or compel an alteration of the nature of the proceeding, applies. *Vinson v. Washington Gas Light Co.*, 321 U.S. 489.

*Section 5 standards and burden of proof are inapplicable.* Section 5 is principally concerned with the bringing under control or management in a common interest of two or more carriers, and a showing that the proposed transaction "will be consistent with the public interest" is required.

When a proceeding determined under section 5 was before the court in *Virginia Stage Lines, Inc., v. United States,* 48 F. Supp. 79 (1942), it said, "It would be difficult to conceive of a statute which confers broader authority and greater administrative discretion than sec. 5." But in *Stearn and Hartman v. United States, supra,* where the court was considering an order entered pursuant to section 212(b) and the rules and regulations prescribed thereunder, it declared:

> But where Congress has entrusted an administrative agency to carry out the purposes of a statute under rules and regulations prescribed by the agency; there is a necessary implication that such rules and regulations must be consistent with the purposes of the statute and reasonably adopted to carry out those purposes; that they must not be contrary to or go beyond the Congressional intent. The broad language "such rules and regulations as the Commission may prescribe" is not an authorization to adopt any rule the Commission may fancy.

In dealing with the same section, the Supreme Court stated in *United States v. Resler,* 313 U.S. 57 (1941), "Undoubtedly the power to prescribe regulations is not unlimited."

In *Atwood's Transport Line—Lease—Clarke,* 52 M.C.C. 97 (1950), referred to with approval in County *of Marin v. United States,* 356 U.S. 412 (1958), it was concluded:

> in our opinion, the Commission may not, through its power to prescribe rules and regulations under section 212(b), in effect, legislate the provisions of section 5 into those transfer rules. It is for the Congress to enact legislation, and it has seen fit to draw a definite line of distinction between transfers of certificates not involved in a transaction which is subject to section 5, and the control of two or more motor carriers * * * subject to section 5, where the transfer of a certificate may be involved.

Whether a transfer of rights would have been denied had it been a transaction subject to section 5 is irrelevant in a transfer proceeding. Approval or disapproval of a transfer depends solely upon conformance or nonconformance with the transfer rules and regulations. See *Wooton-Purchase—Columbia Truck Exp.,* 49 M.C.C. 586 (1949).

*Transfer of dormant rights.*—In the case of abandoned or suspended water carrier operations, section 306.9 of the transfer regulations, contained in the order of August 4, 1943, by division 4, requires—

> a showing that the suspension of operations was caused by circumstances over which the holder of the certificate or permit had no control, and that

> the watercarrier operations authorized under the certificate or permit sought to be transferred will be consistent with the public interest.

The order of August 4, 1943, includes a certain provisions applicable to transfers effected in section 5 proceedings, others specifically applicable only to transfers not subject to section 5, dual provisions, and others about which there has been considerable question, particularly the above-quoted section 306.9. Although undoubtedly the rule was initially intended to require an additional showing, or perhaps an alternative[7] showing to one that the suspension of operations was caused by circumstances over which the transferor had no control, whether the intention was to require the same showing in both proceedings is not clear. If such was the intention, the effect has been modified by subsequent decisions that the rule has no substantive applications under section 5. See *Pan-Atlantic S. S. Corp.—Purchase—Agwilines, Inc.*, 85 M.C.C. 485, 489. Also, decisions interpreting the motor carrier transfer rules have cast doubt on our power to require such showing in transfers not subject to section 5.

The provisions of section 306.9 were derived from a *former* motor carrier transfer rule (1938 edition), under section 212(b), which required—

> a showing that the cessation of operations was caused by circumstances over which the holder of such operating rights had no control, or that the

---

7. Where operations by transferee are shown to be consistent with the public interest, the reason the transferor discontinued operations should not be material. The rule seems to demand more than is required by the statute in connection with a transaction under section 5.

motor carrier operations authorized under the operating rights sought to be transferred are required in the public interest.

The motor carrier rule was revoked, effective December 1, 1943. After several years, a new motor carrier rule was prescribed, effective October 30, 1950, which provided for the transfer of dormant operating rights—

> only upon a showing that the cessation of operations was caused by circumstances over which the holder of such operating rights had no control.

Under that rule, in civil action No. 5885, *Gay v. United States* F. Supp. , decided May 16, 1955, the United States District Court for the Western District of Oklahoma held that the Commission could not deny an application where the lack of operations was caused solely by lack of demand for the services of transferor.

The motor carrier rule has been further revised, as section 179.5(b), effective November 1, 1960, and now reads as follows:

> The mere cessation of operations by the holder of an operating right shall not be deemed to require denial of the proposed transfer of such right. If, however, a cessation of operations has occurred, which fact shall be stated in the application, and operations have not been conducted under the considered rights for a substantial period of time, the proposed transfer will be denied unless the holder shows that such discontinuance was caused by circumtances over which he had no control. The Commission may require, in an appropriate case, proof

of the nature and extent of operations conducted under the operating rights for a period of 6 months preceding the date of the request for such evidence.

Part III does not provide revocation authority and procedures such as are found in part II and part IV of the act. In *United States v. Seatrain Lines, Inc.*, 329 U. S. 424 (1947), the Supreme Court indicated that we are without authority to revoke water carrier certificates or permits in whole or in part, once they have become effective and the time fixed for requesting rehearing or reconsideration has passed. We have recommended to the Congress for 18 years that provisions for revocation for nonuse be added to part III. Bills to implement the recommendation have been introduced, but no such measures have been enacted.

There are a number of water carrier certificates and permits; outstanding which are not being used, and some have been dormant for more than 20 years. In our 61st annual report to Congress, dated November 1, 1947, first recommending inclusion of authority to revoke water carrier operating rights for nonuse, we stated:

> *Probably in many such instances the nonuse is not willful but due to conditions which may reasonably be regarded as beyond the control of the holders.* Changes in economic conditions since the beginning of the war have materially affected the operations of many water carriers and their ability to provide service. How long these conditions may continue cannot be foreseen. * * * *We believe that water carriers should have reasonable protection against loss of their operating rights where abnormal or special conditions have hindered resumption*

*or continuance of operations.* However, we do not believe it to be in the public interest that certificates and permits be wholly beyond administrative scrutiny and control. Accordingly, consideration should be given to the desirability of amending part III of the act by adding thereto revocation provisions similar in substance to those in section 212(a) of part II and section 410(f) of part IV. [Emphasis supplied]

Operations under dormant rights may be revived by the holder at any time. Where the holder is a corporation, its stock can be (and has been in some instances) sold to new interests. Where the new interests are not a carrier or person affiliated with a carrier, there is nothing the Commission can do with respect to such revival. Because no showing can be required of such interests to revive the operations of corporate holders, any showing of public need the Commission might require to revive other operations could be unreasonable and unjust to noncorporate holders. Moreover, as the latter may incorporate, one way or another, in any situation not subject to section 5, the stock can be sold and any such requirement circumvented.

Many transfers are, as stated by the Supreme Court in *County of Marin v. United States, supra,* "little more than a paper transaction," and do not justify regulation substantially as if the transaction were subject to section 5. Even if we look beyond the transfer to a proposed change in the control of transferee not subject to section 5, our jurisdiction extends only to the transfer and determination of whether the *transferee* is fit, willing, and able properly to perform the service authorized by the certificate sought to be trans-

ferred and to conform to the requirements of the act and the Commission's regulations.

As seen, unlike the motor carrier rule, the water carrier rule has not been formally revised. The revision appears overdue and will be undertaken in an appropriate proceeding.

*The prior report.*—Turning now to this transfer, division 3 stated that it was applying the following standards in determining whether the transfer should be set aside (317 I.C.C. at page 666):

> Our reopening the proceeding for hearing and further consideration did not mean that we would determine the application *de novo,* disregarding the fact that no one seasonably opposed the transfer, that no showing of a need for the operations was required prior to approval, that the transfer had been approved and consummated in accordance with the terms of the order of September 9, 1960, that operations were being conducted pursuant to such approval, and that third persons have relied thereon in dealings with transferee. In the circumstances, to set aside the order will require clear and convincing evidence that approval of the transfer was induced by willfully misleading evidence in regard to a vital matter.

The above quotation must be read in conjunction with the following from page 668:

> If the order approving the transfer was properly entered, and the conditions for issuance of the certificate in the name of transferee were fully complied with, the certificate became vested in

> transferee, and the Commission is without power to revoke any water carrier certificate.

The division at that point was referring to intervenors' contentions concerning transferee's operating practices, occurring after the transfer. The refusal by the division to determine the case *de novo* related principally to issues by those contentions.

The most important part of the inquiry is stated in the paragraph following the above quotation from page 666—whether the actual plan would have warranted denial:

> The first question to be resolved is whether applicants purposely presented a plan of transfer and operation such as to warrant approval and thereafter proceeded with acts so inconsistent with the announced plan that, if originally stated, they would have warranted denial of the transfer. We cannot find that they did.

The emphasis is not on whether misrepresentation was willful, but whether the intended actions, if fully disclosed, would have been disapproved. Whether a misrepresentation or nondisclosure was willful would, of course, reflect upon the character or fitness of the applicants and would therefore be material. The division found no misrepresentation as to the nature of the proposed transfer or as to transferee's fitness. Division 4 had known, as competing carriers also should have known, that after the stock was issued, Zubik could sell the stock. Division 3 recognized applicants' lack of candor in regard to Osbourne's intentions to acquire control of transferee but found, in effect, that it did not affect a "vital" matter. "Vital," not "material,"

is the correct word in the context. It connotes something that is not only material to the application but also material to the issues in the reopened case; in other words, a matter which, if fully disclosed in the application, would have caused division 4 to deny the transfer.

The facts in *Abco Moving & Storage Co., Inc.—Purchase—Dierking,* 47 M.C.C. 557, on which interveners rely, are distinguishable from those here present, and that decision is not a precedent for vacating and setting aside the order.[8] The undisclosed real party in interest in that case has been the subject of numerous complaints in the conduct of another transportation business; moreover, on rehearing and a showing that his conduct had improved, that transfer was approved. See 52 M.C.C. 131. Contrary to the situation there, Osbourne's qualifications and participation in the management of transferee were presented in the application. In fact he was more "fit, willing, and able properly to perform the service authorized by the operating rights sought to be transferred" than was Zubik. Nondisclosure, much as it is to be deplored, is tempered by

---

8. That proceeding was initiated prior to the Administrative Procedure Act, and accordingly was not governed by the second sentence of section 9(b), which reads: "Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements."

the nature of the facts not disclosed and an apparent absence of bad faith.

*Transferee's financial condition.*—As of February 28, 1962, transferee showed a deficit in its capital stock and surplus account of $50,711, and its current liabilities exceeded current assets by approximately $6,895. Its income statement for a period of 5 months beginning October 1, 1961, showed operating revenues of $206,015 and deficit of $18,577. However, after eliminating expenses of $31,754 which accrued in the previous year, and deducting income of $5,000, which was incorrectly included in its income statement, transferee actually had a net income of $8,177 for the aforesaid 5 months' period. As previously indicated, it had then been in operation a total of less than 16 months.

In its reply to interveners' petition for reconsideration, transferee offered to demonstrate its improved financial condition as of May 31, 1963, profitable 1963 operations, and plans to build a modern automated towboat upon favorable termination of this litigation. Upon motion by interveners, by the order of December 19, 1963, the material not of record was stricken.

*Transferee's method of operation.*—This was described in the prior report as follows:

> Transferee advertises its general towage service in trade publications and maintains day-to-day contract with tug owners. It issues bills of lading, which describe the shipper's barges and usually also the cargo, but it does not undertake to furnish a specific tug. Upon notice that a shipper's barges will be ready for movement, it arranges for appropriate service. While the shipper's barges are

in tow, it obtains position reports by radio from the tug owner or master. It maintains hull insurance and protection and indemnity coverage against collision and other possibilities of liability. When an outside tower is hired, compensation is in mills per cargo ton-mile, with empty movements in cents per empty barge-mile, in accordance with the custom of the trade. Prior to April 1961 transferee relied exclusively on purchased towage. From that date to the hearing, it chartered a total of 8 tugboats, of which from 1 to 3 were effective at one time, the last of which was the *Charles Zubik*. Six of the vessels were chartered orally or on invoice on a per diem or monthly basis. Others were in writing. The vessel owners or masters employed the crews and paid operating and maintenance expenses.

Interveners' arguments were set forth as follows:

> Interveners argue, and the examiner concluded, that transferee had no water carrier operations to which the towage service performed for it by others was incidental; that without such operations, the use of outside towing is illegal; that such use is justified only in an emergency, or occasionally, and incidental to an actual bona fide transportation operation; and that Osbourne's persistent and continuous "misinterpretation" of section 303(f)(2) as leaving the matter of ownership or operation of towing vessels to economic considerations raises serious questions as to transferee's fitness. Applicants submit that interveners' interpretation is erroneous, but nevertheless transferee's hiring of outside towage during the first several

months of operation met emergency conditions, referring particularly to problems involved in organizing, financing, equipping, and reactivating the operation.

After pointing out again that the issue here is whether the order of September 8, 1960, was properly entered, the division stated that this was not a proper proceeding to determine whether exclusive reliance on outside towage is unlawful, and that, indeed, if it were found to be, only an order to compel compliance, not a revocation of operating authority, would issue. Apropos of transferee's fitness, the division stated:

> We are not here required to decide whether, if transferee had proposed to pursue the described method of operation indefinitely and exclusively, the transfer would not have been approved. Suffice to say that it did not and does not propose to so operate. When the transfer was approved, transferee was a new corporation. It was controlled and managed by personnel well qualified and experienced in water transportation. It proposed to acquire, as soon as possible, necessary towing power units and other equipment, and in this connection, to issue additional stock. We are unable to state at this date that it would not have performed as proposed had interveners not sought to set aside the transfer. While the series of pleadings described in the examiner's report were under consideration, and since the proceeding was reopened, it would have been imprudent to make a further offering of transferee's stock, to contract for the purchase or construction of a towboat, or even to enter into long-term charters.

*Appendix D.*

In their petition for reconsideration, interveners contend that refusal to rule that transferee's "exclusive" reliance on outside towage is unlawful is arbitrary, is inconsistent with the order reopening the proceeding, violates due process requirements of adequate notice, constitutes agency action unlawfully withheld, deprives them of their right to review by the court, and is erroneous. Their arguments in support of their position that exclusive reliance on outside towage is unlawful do not differ materially from those previously made. They have little relevancy to the facts and issues in this case. However, if, as interveners suggest, exclusive reliance on outside towage constitutes brokerage service rather than common carriage, no broker's license is required under part III, and as indicated, it is not illegal not to use a water carrier certificate as a common carrier.

Interveners contend that, regardless of the motives and purpose in reopening this proceeding, and regardless of whether there was any misrepresentation, we could exercise a continuing control and jurisdiction over transferee, its fitness, and method of operation under the authority transferred under section 312 until an appropriate certificate superseding the certificate transferred is issued. Such action would doubtless make the acquisition of vessels and the making of necessary financial arrangements more difficult and might result in more onerous terms to transferee. The conditions, if any, upon which a certificate shall be issued to a transferee ordinarily should be stated in the order approving a transfer, as in any other order authorizing the issuance of a certificate.

Orders approving transfers under section 312 and the transfer regulations are subject to section 315 of

the act and section 9(b) of the Administrative Procedure Act. Section 315(d), as it applies to such orders, provides that orders which have become effective shall continue in force in accordance with the terms thereof, unless suspended, modified, or set aside. Section 315(c) authorizes the suspension, modification, or setting aside of orders by the Commission "upon such notice and in such manner as it shall deem proper." Section 9(b) of the Administrative Procedure Act, as it applies to such orders, prohibits suspension or revocation, "[e]xcept in cases of wilfulness or those in which public health, interest, or safety requires otherwise," before transferee has been notified of the facts or conduct which may warrant such action and been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. Thus, it is clear that, if this were some such precertificate investigation of transferee's financial fitness or operating practices, as interveners suggest, we would not be justified in setting aside approval of the transfer without affording transferee an opportunity to achieve and demonstrate compliance, unless its conduct was willful or its operations were an imminent hazard on the waterways. There is no evidence of the latter, and even if its conduct were willful in point of law, summary withdrawal of approval and reversion of the operating rights to the transferor would not necessarily be the proper course of action. Even under part II, where we may revoke a certificate after hearing and investigation, we may do so only for willful failure to comply, and then only if the holder willfully fails to comply within a reasonable time, not less than 30 days, fixed by us, with a lawful order commanding obedience. Compare *Ace Lines, Inc., Suspension or Revocation of Certificates,* 76 M.C.C. 667.

*Discussion and conclusions.*—As indicated, there is considerable futility in interveners' position, and indeed, in any regulations relating to dormant rights, and there will continue to be until Congress sees fit to write part III revocation power into the law. If division 4 had withheld approval, or if we were to set aside the order of September 9, 1960, the certificate in question would revert to Zubik and could not be revoked. Operations thereunder have been revived and could be continued under Osbourne's management, or again transferred under section 312. There would be no reason why Osbourne, as manager, would file rates different from those filed by Osbourne, as managing director. The rates, which interveners have protested, have been found, in *Towing Rates, Pittsburgh Towing Co., supra,* to be just and reasonable and otherwise lawful, when applied in connection with exclusive use of outside towage.

If exclusive reliance on outside towage were determined to be unlawful or not common carriage, a contrary position could not be deemed completely unreasonable, in bad faith, and no finding of unfitness based on such a method of operation would be warranted. We could not, in the absence of revocation or suspension power under part III, enforce a requirement that transferee, or Zubik, or others employing the same method of operation, perform common carrier service. Compare *Performance of Motor Com. Car. Service by Riss & Co., Inc.*, 48 M.C.C. 327, 49 M.C.C. 111.

Under the transfer regulations in effect when division 4 approved the transfer, there was no valid reason for withholding approval of the transfer. Transferor's suspension of operations was properly regarded as

caused by circumstances over which he had no control. If the proposals described in the application were carried out, transferee would be fit, willing, and able to perform the general towage service authorized by the certificate and to conform to the requirements of the act and the Commission's rules and regulations thereunder.

Interveners were not entitled, as of right, to notice of Osbourne's intentions to acquire Zubik's stock in transferee. The statute does not require any notice to competing carriers and opportunity to be heard in regard to any transaction not subject to section 5. Neither the transfer of the certificate to transferee nor Osbourne's acquisition of control of transferee through purchase of its stock was a transaction subject to section 5.

The evidence does not show that transferee's operations have had any material adverse effect on interveners, the smallest of which has annual gross freight revenues 16 times as great as transferee's.

The option agreement between Osbourne and Zubik should have been filed with the application under section 306.(4b) of the transfer regulations, but the omission, rectified at the hearing, does not require that the order of September 9, 1960, be set aside. Disclosure of the option would not have required a hearing or disapproval of the transfer.

We need not and we do not decide whether transferee is operating as a common carrier when it relies exclusively on outside towage. We decide only that transferee's method of operation does not warrant a finding of unfitness, and transfer of a certificate to an

unfit transferee was not authorized. Even if transferee's financial ability to continue operations were doubtful, and we do not believe that it is, we would not be justified in setting aside the transfer forthwith. We agree with the conclusions in the prior report that postponement of performance on transferee's proposals to obtain additional capital and acquire by lease, charter, or purchase, suitable vessels and other facilities has been a product of the uncertainties attendant on this proceeding. As indicated, notwithstanding our action, a certificate cannot be issued to transferee because of the stipulation entered in the suit to review the orders of April 9, 1963, and December 19, 1963, by division 3. In the circumstances, we believe the proper course is to accord transferee an opportunity, following termination of the current controversies, to demonstrate that suitable vessels and adequate financing have been acquired. An appropriate order will be entered, which will remain in effect for a period of 1 year after termination of the court proceeding, during which period transferee may submit appropriate certification that such vessels and financing have been acquired, whereupon an appropriate certificate superseding the certificate transferred shall be issued.

*Finding.* — Upon reconsideration, we find that the transfer to Pittsburgh Towing Company of the certificate issued in No. W-364 to Charles Zubik on January 18, 1943, was properly approved; that the order of September 9, 1960, by division 4, should be affirmed; and that upon termination of the suit to review the orders of April 9, 1963, and December 19, 1963, by division 3, and upon certification to the Commission that suitable vessels and adequate financing have been acquired to

perform the water carrier service authorized, an appropriate certificate superseding the certificate transferred shall be issued.

An appropriate order will be entered.

VICE CHAIRMAN BUSH CONCURS IN THE RESULT.

COMMISSIONER MURPHY, dissenting

For the reasons indicated in my dissenting expression to the prior report, I am constrained to dissent herein since the same conclusions are reached via the same line of reasoning. In addition, however, I wish to point out that the instant report puts in question the ultimate usefulness of the rules and regulations prescribed by the Commission. Section 306.4(b) of our transfer rules requires, among other things, that applications for transfer produce "copy of all contracts or other written instruments entered into, or proposed to be entered into, pertain to the proposed transfer." The order of September 9, 1960, approving the transfer to transferee was based on misrepresentations and without essential information, which was withheld from the application. It matters not whether division 4, when it issued the order of September 9, 1960, would have denied the same if all the material facts had been disclosed to it. What does matter is that Zubik and Osbourne had entered into a contract for sale of transferee stock prior to the filing of the application and failed to disclose the existence of such a contract in the application. In *Federal Communications Comm. v. WOKO, Inc.*, 329 U. S. 223 the Supreme Court held that denial of a license by the Commission was justified even though the Commission failed to find that the concealment was of material facts or had influenced the Commission in mak-

ing any decision or that it would have acted differently had it known the true facts.

If we are to expect future applicants for transfer of operating authority, or for that matter anyone who files pleadings before the Commission, to respect and abide by our rules and regulations, we should not give lip service to these rules and regulations as is being done herein.

I must also comment on the findings in the report that there is considerable futility in any regulations relating to dormant rights and that there will continue to be until Congress sees fit to write part III revocation power into law. Section 312 requires the Commission in passing on transfers of certificates or permits to prescribe regulations which will provide "protection of the public interest." The position taken by the majority is a denial of its responsibility to protect, in the public interest, existing and continuing water carrier operations. The economic impact of the reactivation of dormant water carrier operating rights upon existing water carriers is a serious problem. Simply because Congress has not seen fit to confer upon the Commission the ultimate power of revocation is not sufficient reason for the Commission to abdicate its effective power under the transfer provisions of the act. Intervening certificated carrier have substantial investments in floating equipment and other property, and have floating equipment, both towboats and barges, in excess of the requirements of the traffic now available or anticipated in the foreseeable future. In addition, there are 10 other common carriers presently holding certificates to perform towage service on all or a portion of the Ohio River.

Contrary to the statement in the report that transferee's operations have not had any material adverse effect on interverners, the record shows that all three interveners experienced a decline in traffic on the Ohio River and in their gross revenues in 1961, which they attribute to the competition of transferee during its first year of operation. Although we do not have the power to revoke a dormant water carrier certificate, we certainly should make an attempt where we do have the power to protect the common carrier operations of other lines in the area which have been continuous and have provided all the transportation required by the shippers. The effect of the institution of operations under rights which have not been exercised over a long period of time is practically the same as would result from an authorization of a new service in competition with existing carriers. Operations under the certificate in question had been suspended for 16 years and no valid reasons, as required by our transfer regulations, were presented to show that it was due to circumstances over which the holder had no control. A mere desire on the part of a prospective purchaser of bare operating rights, with no equipment, to engage in what in effect amounts to a new service, unsupported by a scintilla of evidence of a need therefor, does not warrant approval of an application that flouts our regulations and will allow the institution of operations which will promote unsound economic conditions among the carriers in the area.

COMMISSIONER BROWN, dissenting:

I disagree with the majority and in my opinion we should not approve the transfer of this water carrier certificate. At the time of the issuance of the division 4

orders on September 9, 1960, approving the transfer, the record failed to contain any evidence, financial or otherwise, that would show the transferee able to conduct the water carrier service authorized under the certificate sought to be transferred. Likewise, the record disclosed that the operations had been dormant for over 10 years.

The order of division 3, of September 13, 1961, reopened the proceeding for future consideration and assigned the matter for hearing, without any limitation. I therefore believe that it is incumbent upon us to consider this matter *de novo*. There is no question that the Commission has a right to reopen a proceeding where, as here, there has been a nondisclosure of the officers and directors of the transferee. Compare *Abco Moving & Storage Co., Inc.—Purchase—Dierking*, 47 M.C.C. 557.

The two main issues presented here are (1) whether the transfer would be approved in view of the dormancy problem presented, and (2) whether the transferee has shown that it is fit and able to perform the service authorized by the operating rights sought to be transferred. With regard to dormancy, where there has been a cessation of operations over a substantial period of time, as here, the rule is that a transfer such as this will not be approved unless the holder of the rights shows that the cessation or suspension of operations was caused by circumstances over which the holder had no control. In this case the holder of the operating rights, Charles Zubik, clearly failed to show that the cessation of operations was beyond his control. Division 3 in the prior report, 317 I.C.C. 661 at page 662, appears to have attempted to close this evidential gap by taking official

notice of economic conditions in the late 1940's and their effect on the water carrier industry in general. However, the fact is that Zubik's competitors maintained equipment and conducted substantial operations throughout this same period and up to the present time. It, therefore, appears that official notice was taken of nonexistent conditions. Additionally, Zubik had the burden of proving this point and, based upon the evidence of record, it is apparent that he failed in this regard.

As to the fitness of the transferee, it has no equipment and from its financial statement it appears to be insolvent. No equity capital has been invested in the company and it has no real estate or other fixed assets. In the circumstances, it is my belief that transferee has failed to show that it is fit and able to provide the service in question. Accordingly, I would deny the transfer.

COMMISSIONERS FREAS and GOFF dissent.

## APPENDIX E

PITTSBURGH TOWING COMPANY, Appellant,

v.

MISSISSIPPI VALLEY BARGE LINE COMPANY et al.

385 US 32 17 L ed 2d 31, 87 S Ct 195

[No. 319]

November 7, 1966

### Opinion of the Court

**Per Curiam.**

The motion to dismiss is granted for failure of appellant to comply with the time requirements of Rule 13(1) in docketing his appeal. This appeal was docketed 22 days after expiration of the 60-day period provided by the Rule. During that period, appellant made no application for an enlargement of time, either to the District Court or to a Justice of this Court (see Rule 13(1)), nor did any explanation accompany the untimely docketing of the appeal. The jurisdictional statement itself is silent on the subject. Not until appellee moved to dismiss pursuant to Rule 14(2) did appellant comment upon its default. Its reply to the Motion to Dismiss states that the "delay was occasioned by a misunderstanding between Counsel for appellant." It does not elaborate.

This Court has been generous in excusing errors of counsel, but if there are to be rules, there must be some limit to our willingness to overlook their violation. While we are inclined to be generous in exercising our discretion to forgive a mistake and waive the consequence of negligence, fairness to other counsel and to parties with

business before the Court as well as due regard for our own procedures lead us to believe that this case does not warrant our indulgence.

**Separate Opinion**

Mr. Justice **Black**, dissenting.

Due to a misunderstanding among appellant's lawyers this case was not docketed nor the record filed until 22 days after the 60-day period prescribed by this Court's Rule 13(1). The Court now, quite contrary to its recent practices, dismisses the case pursuant to Rule 14(2) because of this error of appellant's lawyers. Rule 14(2) permits but does not require such a harsh court order to be made. Appellant's counsel, upon reporting the misunderstanding to a member of this Court, could unquestionably have obtained an enlargement of the time to docket the case extending even beyond the 22 days within which the record was actually filed. There is no indication whatever that the appellees, their counsel or other parties with business before this Court, have been injured—as the Court seems to intimate without record support—by this slight formalistic delinquency. On the contrary, the appellant is denied review of a judgment setting aside an Interstate Commerce Commission order, a type of three-judge district court judgment from which Congress has seen fit to give aggrieved persons a direct appeal to this Court. Thus, for a mere paper-filing negligence of appellant's counsel, the purpose of Congress to grant reviews of this special category of administrative orders is frustrated.

This case is now to take its place among a growing number of others where mere procedural rules have been used to prevent the consideration and determination of

cases on their merits. See, e. g., Lord v Helmandollar, 121 US App DC 168, 348 F2d 780, cert denied, 383 US 928, 15 L ed 2d 847, 86 S Ct 929, Black, J., dissenting; Riess v Murchison, cert denied, 383 US 946, 16 L ed 2d 209, 86 S Ct 1196, Black, J., dissenting; Link v Wabash R. Co., 370 US 626, 636, 8 L ed 2d 734, 741, 82 S Ct 1386, Black, J., joined by The Chief Justice, dissenting; Beaufort Concrete Co. v Atlantic States Constr. Co. 384 US 1004, 16 L ed 2d 1018, 86 S Ct 1908, Black, J., dissenting; Santana v United States, 385 US —, 17 L ed 2d 78, 87 S Ct —, Black, J., dissenting. I find it inconsistent with a fair system of justice to throw out a litigant's case because his lawyer, due to negligence, or misunderstanding, or some other reason fails to satisfy one of many procedural time limits. If a pound of flesh is required because of negligence of a lawyer, why not impose the penalty on him and not his innocent client?

As I have previously stated, "The filing of court papers on time is, of course, important in our court system. But lawsuits are not conducted to reward the litigant whose lawyer is most diligent or to punish the litigant whose lawyer is careless. Procedural paper requirements should never stand as a series of dangerous hazards to the achievement of justice through a fair trial on the merits." Amendments to the Federal Rules of Civil Procedure, 384 US 1029, 1034, 15 L ed 2d —, —, Black, J., dissenting. The conflict between the interest of the court clerk in the timely filing of papers and the interest of the citizen in having his lawsuit tried should be resolved in favor of the citizen, not the court clerk. I would not dismiss this case for violation of Rule 13(1).